

**Clean Air Act §176(c) Conformity Determinations
and the Department of Defense**

**by
Susan Mary Fall**

**B.S., May 1983, Boston University
J.D., May 1986, Western New England College School of Law**

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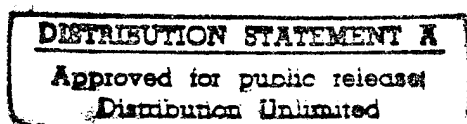
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**Thesis directed by
Laurent R. Hourclé
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Clean Air Act §176(c) General Conformity Determinations and the Department of Defense

CHAPTER I. INTRODUCTION

The modern Clean Air Act is the product of nearly a dozen separate Acts of Congress over the course of the last 40 years.¹ The Act, as it is structured today, was adopted in 1970,² and is the primary federal statute regulating air quality and emissions of pollutants into the air. It is comprised of several different titles, each providing different types of limitations on pollutant emissions.³

The 1970 Clean Air Act required the federal government to establish air quality goals by (*inter alia*) giving authority to the Administrator of the Environmental Protection

¹ See Air Pollution Control Act of 1955, Pub.L. 84-145, 69 Stat. 322; Clean Air Act of 1963, Pub.L. No. 88-206, 77 Stat. 392; Motor Vehicle Air Pollution Control Act, Pub.L. No. 89-272, 79 Stat. 992; Clean Air Act Amendments of 1966, Pub.L. No. 89-675, 80 Stat. 954; Air Quality Act of 1967, Pub.L. No. 90-148, 81 Stat. 485; Clean Air Act Amendments of 1970, Pub.L. No. 91-604, 84 Stat. 1676; Comprehensive Health Manpower Training Act of 1971, Pub.L. No. 92-157, 85 Stat. 431; Energy Supply and Environmental Coordination Act of 1974, Pub.L. No. 93-319, 88 Stat. 246; Clean Air Act Amendments of 1977, Pub.L. No. 95-95, 91 Stat. 686; Steel Industry Compliance Extension Act of 1981, Pub.L. No. 97-23, 95 Stat. 139; Clean Air Act Amendments of 1990, Pub.L. 101-549, 104 Stat. 2399.

² President Richard M. Nixon signed the Clean Air Act Amendments of 1970 on December 31, 1970. Pub.L. No. 91-604, 84 Stat. 1676.

³ Title I regulates stationary sources; Title II regulates mobile sources; Title III contains the "general provisions" of the Act, including its administration and implementation, as well as judicial review and citizen suit provisions; Title VI contains the Act's acid rain provisions; Title V sets forth the operating permit program; and Title VI addresses stratospheric ozone protection.

Agency (EPA) to prescribe national ambient air quality standards (NAAQS).⁴ In 1970, the United States was growing rapidly. It had only a four percent unemployment rate and a two per cent inflation rate.⁵ Optimism encouraged Congress to enact "an ambitious law" when it sought to refine air pollution regulation.⁶ It became clear by 1977, however, that changes were necessary if the goals of the Clean Air Act were to be achieved.⁷

The 1977 amendments to the Clean Air Act included, for the first time, the concept of "conformity." Conformity is the "mechanism intended to ensure that departments, agencies or instrumentalities of the federal government do not take, approve or support actions that are in any way inconsistent with a state's plan to attain and maintain the national ambient air quality standards."⁸ Conformity applies only to federal actions, not to the entire regulated community. As such, it particularly affects the Department of Defense (DOD) whenever it decides to take a variety of actions. Indeed, the Clean Air Act's conformity provision has been called "[p]robably the most significant single environmental

⁴ Clean Air Act §109 directed EPA to establish national primary and secondary ambient air quality standards for certain pollutants with established criteria. Primary standards define levels of air quality that are necessary, with an adequate margin of safety to protect the public welfare. Secondary standards were to be set to protect the public welfare from any known or anticipated adverse effects associated with an air pollutant. 42 U.S.C. §7409. Currently there are six pollutants for which EPA has established NAAQS. These pollutants are carbon monoxide, nitrogen oxide, lead, sulfur dioxide, ozone, and particulate matter. 40 C.F.R. §50. See Arnold W. Reitze, Jr., *Air Pollution Control*, Chapter 1, at 32 (1994); Catherine V. Greco, *State Implementation Plans Under the 1990 Clean Air Act: Can New York Conform?* 11 PACE ENVTL. L. REV. 869, 873 (1994).

⁵ Address by Senator Pete Domenici, reprinted in 19 Natural Res. J. 475, 476 (July 1979).

⁶ Reitze, *supra* note 4, at 37.

⁷ *Id.* "As 1977 approached, not a single steel mill was in full compliance with the [Clean Air Act]. Nearly 50 percent of the refineries, pulp mills, and large commercial boilers were also not meeting [Clean Air Act] requirements. The program to protect areas already having clean air was bogged down by EPA's failure to implement the Prevention of Significant Deterioration (PSD) program. At the same time, unemployment had grown to nine percent, there was double digit inflation, and the nation was struggling with the aftermath of the 1973 Arab oil embargo." *Id.*

⁸ TRANSPORTATION AND GENERAL CONFORMITY UNDER THE CLEAN AIR ACT: MODEL RULES FOR STATE AND LOCAL AGENCIES, State and Territorial Air Pollution Administrators/Association of Local Air Pollution Control Officials (STAPPA/ALAPCO), June 1994, at 5 [hereinafter STAPPA/ALAPCO].

obstacle to [military] base conversion . . .”⁹ This thesis will explore the concept of general conformity, the guidance DOD has created to assist the services in implementing general conformity, and recent conformity litigation that is likely to affect DOD’s activities now and in the future.

CHAPTER II. HISTORICAL BACKGROUND OF THE CLEAN AIR ACT’S CONFORMITY PROVISION

A. The Clean Air Act, B.C. (Before Conformity)

Before 1970, state and federal officials could use their discretion in balancing environmental goals with other concerns when implementing the pre-1970 Clean Air Act.¹⁰ From the 1970 version of the Act onward, clean air was to be achieved by removing discretionary application of the Act and directing federal and state officials to take action.¹¹ By creating the NAAQS, the Clean Air Act Amendments of 1970 established an approach in which federal and state authorities were required to work hand in hand to create and implement air quality regulation.

Not a whisper of the word “conformity” appears in the 1970 Clean Air Act, the purpose of which was to “speed up, expand, and intensify the war against air pollution

⁹ Raymond Takashi Swenson, *Blowin’ in the Wind: The Impact of Air Pollution Regulation on Redevelopment of Closed Military Bases*, FED. FACILITIES ENVTL. J. 331, 333 (Autumn 1993) [hereinafter Swenson].

¹⁰ David Schoenbrod, *Goals Statutes or Rules Statutes: The Case for the Clean Air Act*, 30 UCLA L. REV. 740, 745 (1983).

¹¹ *Id.* at 742.

...¹² Rather, the 1970 Clean Air Act merely enabled SIPs to include land use and transportation controls as part of the many options for air pollution control.¹³ At the same time, the Federal Aid Highway Act of 1970¹⁴ required that highway projects be “consistent” with air quality plans adopted by states. Since during this period states rarely developed serious transportation control plans and the Department of Transportation (DOT) never required air quality reviews of regional transportation plans, the sought after “consistency” never occurred.¹⁵ It became clear that there had to be some better way to deal with transportation-generated pollution, which accounted for 42 percent by weight of the United States’ air pollution as of 1970.¹⁶

B. The Legislative History Behind §176(c)

1. Conformity Under the 1977 Clean Air Act Amendments

In 1977, Congress added the conformity requirement to the Clean Air Act in an effort to deal with transportation-generated air pollution as a cause for air quality nonattainment. The requirement applied to all federal and federally-assisted activities. No department, agency or instrumentality of the Federal government was permitted to finance, license, permit or approve any activity that did not conform to an EPA-approved SIP.¹⁷ The 1977 Clean Air Act Amendments did not specifically define “conformity,”¹⁸

¹² Pub.L. No. 91-604, 1970 U.S.C.C.A.N. (84 Stat.) at 5356.

¹³ Clean Air Act §110(a)(2)(B), 42 U.S.C. §7410(a)(2)(B).

¹⁴ Pub.L. No. 91-605, 84 Stat. 1713 (1970), codified at 23 U.S.C. §109(j).

¹⁵ Arnold W. Reitze, Jr., *Air Pollution Control Law II*, Chapter 15, at 2 (1995)[hereinafter Reitze], citing Yuhunke, *Clean Air in Our Times? The Amendments to Reform Transportation Planning in the Clean Air Act Amendments of 1990*, TRB Legal Workshop (July 23, 1991) [hereinafter Reitze II].

¹⁶ Reitze II, *supra* note 15, at 2, citing Environmental Quality, THE FIRST ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 62 (1970). The rate of transportation-generated air pollution was thought by some to have been as high as 60 percent in 1970. See, e.g., Clean Air Act Amendments of 1970, Pub.L. No. 91-604, 1970 U.S.C.C.A.N. (84 Stat.) 5361.

¹⁷ These requirements have been continued in the 1990 Clean Air Act Amendments.

and it was taken to mean nothing more than conforming to the transportation control measures (TCMs) contained in a SIP.

2. Conformity Under the 1990 Clean Air Act Amendments

After several years of unsuccessful attempts at revamping the Clean Air Act, Congress was finally able to enact a major overhaul of federal air pollution control law during the Bush Administration. There are several reasons why the timing was right in 1990 for a Clean Air Act overhaul. Regulators had discovered that many Clean Air Act provisions were not effective in reducing pollutants, new research began to reveal the causes of acid rain and stratospheric ozone depletion, and the general public was becoming more acutely aware of environmental issues.¹⁹ Additionally, "the desire of several key representatives and senators to enhance their reputations by steering a major bill through Congress"²⁰ as well as active support and participation by the Bush Administration, made it possible for the administration to propose a bill to amend the Clean Air Act the 1990.²¹ Although Congress made numerous changes and fleshed out details in various areas, the bill's basic structure and goals remained intact. The bill was based in part on ideas considered by the previous Congress, resulting in a finished product that was "a nearly equal amalgam of administration and congressional proposals."²² Congress spent several months debating the amendments, but the final version passed by

¹⁸BUREAU OF NATIONAL AFFAIRS, THE CLEAN AIR ACT AMENDMENTS: BNA'S COMPREHENSIVE ANALYSIS OF THE NEW LAW, 48 (1991)[hereinafter BNA].

¹⁹ *Id.* at 1.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 1-2.

wide margins in both houses of Congress -- a 401-25 vote in the House and a 89-10 vote in the Senate.²³ President George Bush signed the amendments into law on November 15, 1990, ending a thirteen year legislative battle over clean air.²⁴

The passage of the 1990 Clean Air Act Amendments made sweeping changes in air pollution control efforts in the United States.²⁵ It focused on air problems which remained unresolved despite 20 years of local, state, and federal efforts. Title I of the Clean Air Act deals with reduction of urban ozone and carbon monoxide pollution. In 1990, Title I -- which contains the conformity requirement -- shifted its focus from simple reliance on state control plans to implementation of an air quality classification system based on severity of pollution and imposition of specific control measures within each category.

Significantly, in 1990 Congress added "an extensive clarification" regarding conformity to the Clean Air Act.²⁶ The 1990 amendments specified that "conformity" means that a plan or project must conform to a SIP's purpose of eliminating or reducing NAAQS violations and achieving expeditious attainment of such standards. The conformity requirement continued to mandate that the Department of Transportation and metropolitan planning organizations (MPOs) determine whether projects within their purview conform.

²³ *Id.* at 2.

²⁴ *Id.* Pub.L. 101-549. See also *President's Signature on Clean Air Act Starts New Era of Pollution Control, Says EDF*, U.S. NEWSWIRE, Nov. 15, 1990, at B5.

²⁵ The Act has been called a "sweeping collection of programs that dwarfs previous environmental laws. Any one of the 1990 Amendments' five major titles would ordinarily be an act in itself." The Honorable Henry A. Waxman, *an Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721, 1724 (1991). The purpose of the 1990 Clean Air Act is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. §7401(b)(1).

²⁶ BNA, *supra* note 18, at 48.

Congress also required EPA to promulgate, by November 15, 1991, new rules establishing specific criteria and procedures that must be used in "determining conformity."²⁷ EPA failed to issue any conformity rules by the statutory deadline, prompting the Environmental Defense Fund (EDF), the Sierra Club, and Carla Baird to file a citizen suit under 42 U.S.C. §7604(a)(2) to compel promulgation of such rules.²⁸ After settlement discussions, the parties entered into a stipulated consent decree requiring EPA to issue final conformity criteria and procedures by October 15, 1993.²⁹ On November 24 and 30, respectively, EPA published conformity rules for (1) transportation plans and projects (known as the "Transportation Conformity Rule")³⁰ and (2) other federally funded or supported projects (known as the "General Conformity Rule").³¹ These final rules provided criteria and procedures for determining conformity in areas deemed "nonattainment" or "maintenance" areas.³² EPA expressly declined, however, to issue a rule on criteria and procedures for "attainment" or "unclassifiable" areas.³³

²⁷ 42 U.S.C. §7506(c)(4)(A).

²⁸ See *Environmental Defense Fund, Inc. v. Carol M. Browner, et al.*, DC N.Calif., No. C-92-1636, U.S. Dist. LEXIS 2616 (February 10, 1995) at 2 [hereinafter *EDF v. Browner*].

²⁹ On EPA's motion, the deadline was extended until November 15, 1993. *Id.*

³⁰ 58 Fed. Reg. 62188 (November 16, 1993); 40 C.F.R. part 51, subpart T.

³¹ Determining Conformity of General Federal Actions to State or Federal Implementation Plans; Final Rule, 58 Fed. Reg. 63214 (November 30, 1994) [hereinafter *Final Rule*].

³² "Nonattainment" areas are those where the NAAQS have been violated for a particular criteria pollutant. 42 U.S.C. §7407(d)(1). "Maintenance" areas, on the other hand, are those areas that were designated nonattainment after the 1990 Clean Air Act amendments but subsequently determined to be in compliance with NAAQS and thus in "attainment." 40 C.F.R. §51.392; 51 Fed. Reg. 62217.

³³ "Attainment areas" already meet ambient air quality standards and "unclassifiable areas" cannot be categorized as attainment or nonattainment on the basis of available information. 42 U.S.C. §7407(d)(1). EPA noted in the final conformity rule that it intended "in the near future" to issue a supplemental notice of proposed rulemaking to deal with conformity requirements for transportation related projects in a limited category of attainment areas. See *Final Rule*, *supra* note 31, at 63214.

3. Conformity Determinations Under §176(c)

The 1990 Clean Air Act amendments to §176 thus created two distinct programs -- general conformity and transportation conformity. Although associated, the two provisions differ in focus. Transportation conformity applies to transportation plans, programs and projects funded or approved by the Federal Highway Administration (FHWA) or the Federal Transit Administration (FTA) or recipients of funds from these organizations. general conformity applies to all other federal actions in nonattainment areas.

a. What is Transportation Conformity?

Clean Air Act §176(c)(2) is known as the "transportation conformity" provision. Although an in-depth discussion of transportation conformity is beyond the scope of this thesis, a brief explanation is appropriate in order to enable the reader to differentiate transportation conformity from general conformity and place the concept in its proper perspective.

EPA issued final rules establishing criteria and procedures for transportation conformity on November 15, 1993.³⁴ They were codified in Part 51, Subpart T, of the Code of Federal Regulations.³⁵ Transportation conformity has been described as "a quantitative test intended to prevent uncontrolled increases in vehicle emissions that

³⁴ 58 Fed. Reg. 62188.

³⁵ 40 C.F.R. Part 51.

undermine the strategy established in the SIP and impede attainment and maintenance of clean air.”³⁶

The 1990 Clean Air Act Amendments to §176(c)(2) increased the contributions that transportation plans, programs and projects must make toward air quality improvements in nonattainment areas. Transportation conformity under the federal rule applies to the long-range Regional Transportation Plan, the shorter-term Transportation Improvement Program (TIP), all transportation projects that receive funding or require approval from the FHWA or the FTA, and regionally significant non-federal transportation projects that are sponsored by a recipient or federal highway or transit funds, regardless of whether federal funds were actually used for the project.³⁷ Expected emissions from transportation plans and TIPs must be consistent with the implementation plan’s motor vehicle emission estimates and required emissions reductions. Transportation activities must actually contribute to attainment and maintenance of health-based air quality standards.³⁸

b. What is General Conformity?

Clean Air Act §176(c)(1) has come to be known as the “general conformity” provision. It prohibits the federal government from funding, licensing, permitting, approving or otherwise supporting activities which do not conform to an approved SIP.³⁹

³⁶ BNA, *supra* note 18, at 12.

³⁷ *Id.* at 13.

³⁸ *Id.* at 12.

³⁹ Clean Air Act §176(c)(1), 42 U.S.C. §7506(c)(1).

If the federal activity does not conform, it will not be approved or allowed to proceed.⁴⁰

A project can come to a screeching halt while it is still in the planning stage if it does not conform and cannot otherwise offset or mitigate its emissions. In this respect the conformity rule is unlike NEPA, which merely requires "consideration" of environmental impacts and allows federal projects which will result in adverse environmental impacts to proceed so long as all procedural hurdles are met. The conformity rule, on the other hand, can be called a "comply or die" requirement -- without a conformity finding, the federal project will not survive.

General conformity is intended to hold those with responsibility for a project accountable for the project's resulting emissions, with the ultimate goal of preventing actions that are in some way supported by the federal government from undermining efforts to achieve and maintain clean air in a cost effective manner.⁴¹ General conformity is based on the principle that the agency that sponsors or supports an activity is in the best position to limit the adverse air quality impacts of that activity.⁴² It is the belief of conformity proponents that "if such steps to avoid pollution are not taken, the result will be degraded air quality, adverse public health consequences, and an increased burden on regulatory agencies, and ultimately the public, to compensate for the additional air pollution by imposing more rigorous controls on another sector of society."⁴³

⁴⁰ "A Federal agency must make a determination that a Federal action conforms to the applicable implementation plan in accordance with the requirements of this subpart before the action is taken." 40 C.F.R. §93.150(b).

⁴¹ STAPPA/ALAPCO, *supra* note 8, at 141.

⁴² *Id.*

⁴³ *Id.*

CHAPTER III. IMPLEMENTING CLEAN AIR ACT §176(c)(1)

A. The Statutory Provision: 42 U.S.C. §7506(c)(1)

The statutory conformity provision is entitled "Limitation on Certain Federal Assistance," while §176(c) itself is called "Activities Not Conforming to Approved or Promulgated Plans." Section 176(c)(1), as revised by the 1990 Clean Air Act Amendments, provides that:

No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 [Clean Air Act §110] of this title. . . The assurance of conformity to such an implementation plan shall be an affirmative responsibility of the head of such department, agency, or instrumentality.⁴⁴

Conformity to an implementation plan means conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and that such activities will not (1) cause or contribute to any new violation of any standard in any area; (2) increase the frequency or severity of any existing violation of any standard in any area; or (3) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.⁴⁵ The statutory provision required the EPA Administrator to promulgate criteria and procedures for determining conformity no later than November 15, 1991.⁴⁶

⁴⁴ Clean Air Act §176(c)(1), 42 U.S.C. §7506(c)(1)

⁴⁵ Clean Air Act §176(c)(1)(A) and (B), 42 U.S.C. §7506(c)(1)(A) and (B).

⁴⁶ Clean Air Act §176(c)(4)(A), 42 U.S.C. §7506(c)(4)(A).

B. The Regulation

1. Overview

EPA promulgated the General Conformity Rule, 40 C.F.R. Part 93, Subpart B,⁴⁷ on November 30, 1993, in order to clarify the applicability and procedures for ensuring conformity of non-transportation projects with the goals of the SIP. The General Conformity Rule covers direct and indirect emissions of criteria pollutants or their precursors that are caused by a federal action, are reasonably foreseeable, and can practicably be controlled by the federal agency through its continuing program responsibility. Each federal agency must determine that any actions covered by the rule conform to the applicable SIP before the action is taken.

The only federal actions not subject to the General Conformity Rule are those covered by the Transportation Conformity Rule, those with emissions considered *de minimis* under the rule, and those which the rule explicitly exempts or presumes to conform. The rule establishes specific procedural requirements, discussed below, which federal agencies must follow when making conformity determinations.

2. The Prohibition

⁴⁷ The promulgated regulation amended three parts of Title 40 of the Code of Federal Regulations -- Part 6 (Procedure for Implementing the Requirements of the Council on Environmental Quality on the National Environmental Policy Act), Part 51 (Requirements for Preparation, Adoption and Submittal of Implementation Plans), and Part 93 (Determining Conformity of Federal Actions to State or Federal Implementation Plans). The language in Parts 51 and 93 are essentially identical, the only difference being the references to SIP revisions. For ease of discussion, therefore, this thesis will focus on Part 93, which contains the conformity rule immediately applicable to federal activities, which remains in effect during the interim period before the state revises -- and EPA approves -- the SIP.

This section states, "No department, agency or instrumentality of the Federal government shall engage in, support in any way or provide financial assistance for, license or permit, or approve any activity which does not conform to an applicable implementation plan."⁴⁸ A federal agency is required to make a determination that a federal action conforms to the applicable implementation plan before the agency takes the action,⁴⁹ except in certain specifically grandfathered situations.⁵⁰

3. State Implementation Plan (SIP) Revision

Until a state has an EPA-approved SIP which includes conformity provisions, the federal conformity regulation promulgated by EPA applies and its criteria and procedures must be followed by federal agencies.⁵¹ After a state has developed -- and EPA has approved -- a SIP which includes general conformity provisions, federal agencies need follow only the approved SIP provisions.⁵² Only the most recently approved SIP may be

⁴⁸ 40 C.F.R. §93.150(a). The regulation's language reiterates the statutory prohibition against actions which do not conform, but ties such conformity to an "applicable implementation plan" rather than to an "implementation plan after it has been approved or promulgated under section 7410 [Clean Air Act §110] . . ." as is required by the statutory language. Clean Air Act §176(c)(1), 42 U.S.C. §7506(c)(1).

⁴⁹ 40 C.F.R. §93.150(b).

⁵⁰ The conditions which preclude the need for a conformity determination are: (1) a NEPA analysis was completed as evidenced by a final environmental assessment (EA), environmental impact statement (EIS), or finding of no significant impact (FONSI) that was prepared before January 31, 1994; or (2) before December 30, 1993, an environmental analysis was commenced or a contract awarded to develop the specific environmental analysis; sufficient environmental analysis was completed by March 15, 1994 so that the federal agency could determine that the federal action was in conformity with the specific requirements and the purposes of the applicable SIP; and a written determination of conformity under Clean Air Act §176(c) was made by the federal agency responsible for the federal action by March 15, 1994. *Id.* at §93.150(d). This section also notes that notwithstanding any provision of this subpart of the Code of Federal Regulations, a conformity determination does not exempt the federal action from any other requirements of the SIP, NEPA or the Clean Air Act.

⁵¹ 40 C.F.R. §93.151, 58 Fed. Reg. 63214, 63253.

⁵² 40 C.F.R. §93.151. A state may, however, commit to revise the SIP to accommodate the action. In such a case, the state is actually committing to changing the SIP. Completion of a SIP revision therefore does not become an issue. GENERAL CONFORMITY GUIDANCE QUESTIONS AND ANSWERS, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards (MD-15) (July 13, 1994) at 5 [hereinafter CONFORMITY GUIDANCE].

used by the federal agency in the conformity determination process.⁵³ This requirement can put the agency in an awkward position, since it may well find itself making its conformity analysis using an old SIP while a newly submitted SIP revision containing revised general conformity criteria and procedures is pending approval by EPA during the agency's analysis process.⁵⁴ SIP revision approval during this period could require the federal agency to start its conformity analysis again from the beginning, this time using the new SIP's criteria and procedures.

States are permitted to establish conformity criteria and procedures in their SIPs that are more stringent than those in the EPA regulation, but only if such standards apply equally to federal and nonfederal entities.

4. Definitions

The regulation contains a number of specific definitions which are unique to the conformity rule and appear nowhere else in the Clean Air Act. The most crucial of these include:

a. **Federal Action.** A federal action is "[a]ny activity engaged in by a department, agency, or instrumentality of the federal government, or any activity that such an entity supports in any way, provides financial assistance for, licenses, permits, or approves, other than certain activities related to transportation plans, programs and projects. Where the federal action is a permit, license, or other approval for some aspect of a non-federal

⁵³ If a SIP revision has been adopted by a state and submitted to EPA but has not been approved by EPA at the time of the conformity analysis, it cannot be used for general conformity determinations. *Id.*

⁵⁴ 40 C.F.R. §93.151. Any previously applicable SIP requirements relating to conformity remain enforceable until the state revises its SIP to specifically remove them and that revision is approved by EPA. *Id.*

undertaking, the relevant activity is the part, portion or phase of the nonfederal undertaking that requires the federal permit, license or approval.”⁵⁵

b. **Direct Emissions.** “Those emissions of a criteria pollutant or its precursors that are caused or initiated by the federal action and occur at the same time and place as the action.”⁵⁶

c. **Indirect Emissions.** “Those emissions of a criteria pollutant or its precursors that (1) are caused by the federal action, but may occur later in time and/or may further removed in distance from the action itself but are still reasonably foreseeable; and (2) the federal agency can practicably control and will maintain control over due to a continuing program responsibility of the federal agency.”⁵⁷

Several other conformity-specific definitions are also included in the regulation.⁵⁸

⁵⁵ 40 C.F.R. §93.152.

⁵⁶ *Id.* Direct emissions include, for example, operational emissions of a federal facility or emissions from dredging equipment used in a Clean Water Act §404 dredge and fill permit. CONFORMITY GUIDANCE, *supra* note 52, at 6.

⁵⁷ 40 C.F.R. §93.152. Indirect emissions include, for example, emissions from commuters traveling to and from a federal project. Such emissions are considered reasonably foreseeable. CONFORMITY GUIDANCE, *supra* note 52, at 14. According to EPA, “control” as used here means the ability to regulate in some way the emissions from the federal action. This can be demonstrated directly (as through the use of emissions control equipment on a smokestack) or indirectly (as through the implementation of regulations or conditions on the nature of an activity that may be established in permits or approvals or by the design of the action). An example of control includes the ability of a federal agency to control the level of vehicle emissions by controlling the size of the parking facility and setting requirements for employee trip reductions. *Id.* at 13.

⁵⁸ 40 C.F.R. § 93.152. In general, terms which are not specifically defined within the conformity regulation have the meanings ascribed to them in the Clean Air Act and EPA’s regulations at 40 C.F.R. Chapter 1. Special conformity-related definitions contained in Subpart B include:

a. **Applicable Implementation Plan or Applicable SIP.** The portion or portions of the SIP or most recent SIP revision which has been approved under Clean Air Act §110 (or promulgated under Clean Air Act §110(c)), or promulgated and approved pursuant to regulations promulgated under Clean Air Act §301(d) and which implements the relevant requirements of the Clean Air Act.

Clean Air Act §110(c) deals with EPA promulgation of a federal implementation plan (FIP) in situations where a state fails to make a required submission or a SIP revision, where EPA finds a state’s submission fails to meet minimum criteria, or EPA disapproves a SIP submission in whole or in part.

Clean Air Act §301(d) deals with Native American tribal authority. It authorizes the EPA Administrator to treat Indian tribes as states and to provide them with grants and contract assistance for meeting Clean Air Act requirements. A tribe may be treated as a state if (1) it has a governing body

carrying out substantial governmental duties and powers, (2) the functions to be exercised by the tribe pertain to the management of and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction, and (3) the tribe is reasonably expected by the Administrator to be capable of carrying out the Clean Air Act functions for which it will be responsible. Tribes meeting these requirements may establish tribal implementation plans pursuant to guidance promulgated by EPA. Clean Air Act §301(d)(1)-(3); 42 U.S.C. §7601(d)(1)-(3).

b. **Cause or contribute to a new violation.** A federal action that (1) causes a new violation of a NAAQS at a location in a nonattainment or maintenance area which would otherwise not be in violation of the standard during the future period in question if the federal action were not also taken; or (2) contributes, in conjunction with other reasonably foreseeable actions, to a new violation of a NAAQS at a location in a nonattainment or maintenance area in a manner that would increase the frequency or severity of the new violation.

c. **Criteria Pollutant or Standard.** Any pollutant for which a NAAQS has been established at 40 C.F.R. Part 50.

d. **Emergency.** A situation where extremely quick action on the part of the federal agency involved is needed and where the timing of such federal activities makes it impractical to meet the requirements of Subpart B. Examples include military mobilizations, natural disasters, and civil disturbances such as terrorist acts.

e. **Emissions Offsets.** For purposes of 40 C.F.R. §93.158, these are emissions reductions which are quantifiable, consistent with the applicable SIP attainment and reasonable further progress demonstrations, surplus to reductions required by, and credited to, other applicable SIP provisions, enforceable at both the state and federal levels, and permanent within the time frame specified by the program.

f. **Emissions that a Federal Agency has a Continuing Program Responsibility For.** Emissions that are specifically caused by an agency carrying out its authorities. This term does not include emissions that occur due to subsequent activities, unless such activities are required by the federal agency. When an agency, in performing its normal program responsibilities, takes actions itself or imposes conditions that result in air pollutant emissions by a nonfederal entity taking subsequent actions, such emissions are covered by the meaning of a continuing program responsibility.

g. **Federal Agency.** For purposes of Subpart B, a federal agency means a federal department, agency or instrumentality of the federal government.

h. **Increase the Frequency or Severity of any Existing Violation of any Standard in any Area.** To cause a nonattainment area to exceed a standard more often or to cause a violation at a greater concentration that previously existed and/or would otherwise exist during the future period in question, if the project were not implemented.

i. **Precursors of a Criteria Pollutant.** For ozone, precursors are (1) nitrogen oxides (NO_x) unless an area is exempted from NO_x requirements by Clean Air Act §182(f); and (2) volatile organic compounds (VOCs). For particulate matter (PM₁₀), precursors are those pollutants described in the PM₁₀ nonattainment area applicable SIP as significant contributors to the PM₁₀ levels.

j. **Reasonably Foreseeable Emissions.** Projected future indirect emissions that are identified at the time the conformity determination is made; the location of such emissions is known and the emissions are quantifiable, as described and documented by the federal agency based on its own information and after reviewing any information presented to the federal agency.

k. **Regionally Significant Action.** A federal action for which the direct and indirect emissions of any pollutant represent 10 percent or more of a nonattainment or maintenance area's emissions inventory for that pollutant.

l. **Total of Direct and Indirect Emissions.** The sum of direct and indirect emissions increases and decreases caused by the federal action; i.e., the "net" emissions considering all direct and indirect emissions. The portion of emissions which are exempt or presumed to conform are not included in the "total of direct and indirect emissions." The "total of direct and indirect emissions" includes emissions of criteria pollutants and their precursors.

5. Applicability

This section is designed to answer the question: "Do I have to make a conformity determination?" In deciding how the General Conformity Rule would apply, EPA chose to establish a threshold limit⁵⁹ for each of the six criteria pollutants affected by the rule (carbon monoxide, nitrogen oxide, sulfur dioxide, ozone, lead, and particulate matter). If a federal agency action emits below these limits, it is exempt from having to make a conformity determination. According to EPA, these *de minimis* limits serve as cutoff points to focus on those federal actions likely to have the most significant impacts on air quality. This was "an effort to limit time and resources invested by agencies in making determinations for thousands of Federal actions annually . . ."⁶⁰

a. Exemptions

Several types of federal actions are completely exempted from complying with the conformity rule. Generally speaking, these exemptions encompass activities which either emit obviously minimal amounts of pollutants or none at all, such as interagency transfers of property and judicial and legislative proceedings.⁶¹

⁵⁹ 40 C.F.R. §93.153. For DOD actions, a conformity determination is required for each pollutant where the total of direct and indirect emissions in a nonattainment or maintenance area caused by a federal action would equal or exceed any of the rates shown in the tables reproduced at Appendix H and I. According to EPA, the Final Rule applies only to nonattainment and maintenance areas, and not to attainment or unclassifiable areas. A separate rulemaking, yet to be scheduled, would establish a conformity rule for attainment/unclassifiable areas. CONFORMITY GUIDANCE, *supra* note 52, at 3. EPA expressly declined in the Final Rule to make the rule applicable in attainment areas, stating, "... EPA cannot now apply these rules in attainment areas because it did not propose to do so." Final Rule, *supra* note 31, at 63214. *But see* discussion in Chapter VI concerning the EDF v. Browner decision requiring EPA to promulgate conformity regulations in both attainment and nonattainment areas. It is also worth noting when discussing applicability that the U.S. territories of Puerto Rico and Guam are subject to the General Conformity rule, in the same manner as the territorial United States, Alaska and Hawaii. CONFORMITY GUIDANCE at 6.

⁶⁰ CONFORMITY GUIDANCE, *supra* note 52, at 4.

⁶¹ *Id.* at §93.153(c)(1)-(4). Exempted federal actions include:

b. Conformity Determinations Expressly Not Required

Conformity determinations are expressly not required for five categories of key activities, regardless of the amount of emissions they produce.⁶² These categories include

(1) Actions where the total of direct and indirect emissions are below the emissions levels specified in the tables reproduced at Appendix H and I;

(2) Actions which would result in no emissions increase or an increase in emissions that is clearly *de minimis*. Examples which are particularly pertinent to DOD include:

(a) Continuing and recurring activities such as permit renewals where activities conducted will be similar in scope and operation to activities currently being conducted.

(b) The routine, recurring transportation of materiel and personnel.

(c) Routine operation of facilities, mobile assets and equipment.

(d) Routine movement of mobile assets, such as ships and aircraft, in home port reassignments and stations (when no new support facilities or personnel are required) to perform as operational groups and/or for repair or overhaul.

(e) Actions with respect to existing structures, properties, facilities and lands where future activities conducted will be similar in scope and operation to activities currently being conducted at the existing structures, properties, facilities and lands (such as relocation of personnel and disposition of federally-owned existing structures, properties, facilities and lands).

(f) Transfers of ownership, interests, and titles in land, facilities, and real and personal properties, regardless of the form or method of the transfer.

(g) Transfers and assignments of real property, including land, facilities, and related personal property from one federal entity to another for subsequent deeding to eligible applicants.

(h) Maintenance dredging and debris disposal where no new depths are required, applicable permits are secured, and disposal will be at an approved disposal site.

(i) Routine maintenance and repair activities, including repair and maintenance of administrative sites, roads, trails and facilities.

3. Actions where the emissions are not reasonably foreseeable.

4. Actions which implement a decision to conduct or carry out a conforming program.

EPA noted in its summary of the final general conformity regulation, 58 Fed. Reg. 63214, 63229, that in addition to the above list, other activities that are illustrative of the *de minimis* exemption include routine monitoring and/or sampling of air, water, soils, effluent, etc.; participating in air shows and fly-overs by military aircraft; advisory and consultative activities such as legal counseling; and air traffic control activities and adopting approach, departure and enroute procedures for air operations.

⁶² *Id.* at §93.153(d)(1)-(4). Specifically, they are:

1. The portion of an action that includes major new or modified stationary sources that require a permit under the Clean Air Act §173 New Source Review (NSR) program or the Clean Air Act Title I, Part C, Prevention of Significant Deterioration (PSD) program.

2. Actions in response to emergencies or natural disasters such as hurricanes or earthquakes which are commenced very shortly (i.e., within hours or days) after the incident.

3. Research, investigations, studies, demonstrations, or training where no environmental detriment is incurred, and/or the particular action furthers air quality research, as determined by the state agency primarily responsible for the applicable SIP.

4. Alteration and additions of existing structures as specifically required by new or existing applicable environmental legislation or regulations.

5. Direct emissions from remedial and removal actions carried out under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and associated regulations to the

such common sense exclusions as responses to emergencies or natural disasters and alteration of structures which is required by environmental law -- for example, hush houses for aircraft engines and installation of scrubbers on smokestacks.

c. Continuing Responses to Emergencies

As noted above, emergency actions do not require a conformity determination. By their nature, emergencies are generally short-lived occurrences. Certain federal responses to emergency situations, however, may continue for several months after their initial commencement. Perhaps the most notable recent example is Operation Desert Storm. In such circumstances, a federal agency is permitted to continue its ongoing response action, so long as it complies with certain procedural requirements.⁶³

d. Establishing Activities that are Presumed to Conform

Some federal actions are "presumed to conform" without the need for undergoing a conformity determination.⁶⁴ These activities are established by rulemaking by the federal

extent such emissions comply with the substantive requirements of the PSD/NSR permitting program or that are exempted from other environmental regulation under CERCLA or its applicable regulations

⁶³ Federal actions which are part of a continuing response to an emergency or disaster and which are to be taken more than six months after the commencement of the response action are exempt from the requirements of Subpart B only if the federal agency makes a written determination that it is impractical to prepare the conformity analysis which would otherwise be required and the actions cannot be delayed due to overriding concerns for public health and welfare, national security interests and foreign policy commitments. Such actions can be continued if the agency makes a new, follow-on written determination. *Id.* at §93.153(e)(1) and (2). According to the regulation, "actions which are to be taken after those actions covered by paragraph (e)(1) of this section, the Federal agency makes a new determination as provided in paragraph (e)(1) of this section."

⁶⁴ *Id.* at §93.153(g). A federal agency must meet the criteria for establishing activities that are presumed to conform by either:

(1) Demonstrating that the total of direct and indirect emissions from the type of activities which would be presumed to conform would not (a) cause or contribute to any new violation of any standard in any area; (b) interfere with provisions in the applicable SIP for maintenance of any standard; (c) increase the frequency or severity of any existing violation of any standard in any area; or (d) delay timely

agencies themselves, not by EPA or state regulators, in accordance with EPA guidelines. A federal agency must publish in the Federal Register a list of its proposed activities that are presumed to conform and the basis for the presumptions.⁶⁵ The agency must provide at least 30 days for public comment on the list and must notify appropriate EPA Regional Office(s), state and local air quality agencies.⁶⁶ Agency responses to all comments received must be documented, and responses and a final list of activities must be made available to the public upon request.⁶⁷ The final list of activities presumed to conform must be published in the Federal Register.⁶⁸

e. Regionally Significant Actions

Even if a federal action's emissions are below the *de minimis* thresholds, the agency must still do a conformity determination if the emissions of one of the six criteria pollutants represents 10 percent or more of a nonattainment area's emissions for that pollutant.⁶⁹

attainment of any standard or any required interim emission reductions or other milestones in any area including, where applicable, emission levels specified in the applicable SIP for purposes of a demonstration of reasonable further progress, attainment or a maintenance plan; or

(2) Providing documentation that the total of direct and indirect emissions from such future actions would be below the emission rates found in 40 C.F.R. §93.153(b) for a conformity determination.

⁶⁵ *Id.* at §93.153(h)(1).

⁶⁶ *Id.* at §93.153(h)(2). The agency must also notify the involved MPO and any agency designated under Clean Air Act §174. *Id.*

⁶⁷ *Id.* at §93.153(h)(3).

⁶⁸ *Id.* at §93.153(h)(4).

⁶⁹ *Id.* at §93.153(j). An action is deemed "regionally significant" if the total of direct and indirect emissions of any pollutant from a federal action does not equal or exceed the ton per year rates specified in 40 C.F.R. §93.153(b)(1) or (2), but represents 10 percent or more of a nonattainment or maintenance area's total emission of that pollutant. *Id.* Emissions from stationary, area and mobile sources should all be considered in calculating the 10 percent figure. CONFORMITY GUIDANCE, *supra* note 52, at 11. Where federal actions otherwise presumed to conform are also regionally significant actions -- or if they do not meet one of the prerequisite criteria of 40 C.F.R. §93.153(g)(1) or (2) -- the action will not be presumed to conform and must comply with §93.150 and §93.155 through §93.160. *Id.* at §93.153(j). One commentator has said of this section, "I found this language somewhat puzzling. Perhaps this is an

6. Conformity Analysis

A federal agency which is about to take a federal action is required to make its own conformity determination.⁷⁰ In doing so, it must consider comments from any interested parties, including the public and regulatory agencies. Multiple federal agencies may have jurisdiction over various aspects of a federal project. In making its conformity determination in such a situation, a federal agency may adopt the conformity analysis of another federal agency or develop its own.⁷¹

7. Reporting Requirements

A federal agency must provide a 30 day notice describing the proposed action and a copy of the draft conformity determination to the appropriate EPA Regional Office(s), state and local air quality agencies, affected federal land managers (where applicable), any agency designated under Clean Air Act §174, and the Metropolitan Planning Organization (MPO). These groups must also be notified within 30 days after making a final conformity determination.⁷²

outgrowth of the technical writing style employed, but this seems to say that if a project thought to be eligible for the presumption turns out, after the fact, not to meet the criteria, a conformity determination must be accomplished to offset or mitigate any increases. The statement seems unnecessary, although *it makes clear the point that the agency will take a dim view of actions presumed to conform that actually don't.*" (Emphasis in original.) Scott D. Stubblebine, *Applying Conformity Determinations under Section 176(c) of the Clean Air Act: NEPA with a Hammer*, FED. FACILITIES ENVTL. J. 319, 326 (Autumn 1994).

⁷⁰ *Id.* at §93.154.

⁷¹ 40 C.F.R. §93.154. The ability to adopt another agency's conformity analysis is comparable to agencies' ability under NEPA to adopt and incorporate into an EIS relevant documentation generated by other agencies so long as environmental impacts are fully and adequately addressed in such documentation. See 40 C.F.R. §1506.3

⁷² 40 C.F.R. §93.155.

8. Public Participation

If anyone makes a request for a copy of a draft conformity determination concerning a specific federal action, the federal agency must make it available. It must also provide the supporting materials which describe the analytical methods and conclusions the agency relied upon in making the applicability analysis and the draft conformity determination.⁷³

The agency is required to publicize the draft conformity determination by running a prominently placed advertisement in a daily general circulation newspaper in the area affected by the action.⁷⁴ It must give the public 30 days in which to comment on the draft before taking any formal action on it. This comment period may be concurrent with any other public involvement in the project, such as NEPA public comment periods.⁷⁵ The agency's response to all comments must be documented and made available within 30 days of the final conformity determination to anyone who requests them.⁷⁶ The final conformity determination must be publicized by running another prominent advertisement in a daily general circulation newspaper in the affected area within 30 days of the determination.⁷⁷

9. Frequency of Conformity Determinations

Conformity determinations automatically lapse in five years unless the federal action has been completed or a continuous program has begun to implement the federal

⁷³ *Id.* at §93.156.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

action within a reasonable time.⁷⁸ Ongoing federal activities at specific sites that show continuous progress are not new actions and do not require periodic conformity redeterminations so long as they are within the scope of the final conformity determination. If a federal action changes, thereby increasing the total of direct and indirect emissions above the levels listed in 40 C.F.R. §93.153(b), a new conformity determination is required.⁷⁹

10. Criteria for Determining Conformity of General Federal Actions

This labyrinthine and somewhat daunting portion of the regulation is the core of the entire conformity process. Successfully navigating this portion of the regulation is critical to a federal agency's ability to determine accurately whether its proposed action will conform to the applicable SIP. If an agency does not have the personnel in-house with the ability to make the conformity determination, it must hire a knowledgeable contractor to do so -- a process that, in itself, is often fraught with difficulty.

For a federal action to be deemed to conform to the applicable SIP, it must satisfy a number of interrelated prerequisites.⁸⁰ For each applicable nonattainment pollutant or

⁷⁸ *Id.* at §93.157.

⁷⁹ *Id.*

⁸⁰ *Id.* at §93.158. Federal actions required to undergo a conformity determination will be determined to conform to the applicable SIP if, for each pollutant exceeding the tons per year rates of 40 C.F.R. §93.153(b) -- or which otherwise needs a conformity determination because of the total direct and indirect emissions from the action -- the action satisfies the requirements of 40 C.F.R. §93.158(c) and meets any of the following requirements listed in 40 C.F.R. §93.158(a):

1. For any criteria pollutant, the total of direct and indirect emissions from the action are specifically identified and accounted for in the applicable SIP's attainment or maintenance demonstration;

2. For ozone and nitrogen dioxide, the total of direct and indirect emissions from the action are fully offset within the same nonattainment or maintenance area through a revision to the applicable SIP or

a similarly enforceable measure that effects emissions reductions so that there is no net increase in emissions of that pollutant;

3. For any criteria pollutant except ozone and nitrogen dioxide, the total of direct and indirect emissions from the action meet the requirements (a) specified in 40 C.F.R. §93.158(b) based on areawide and local air quality modeling analysis; or (b) meet the requirements of 40 C.F.R. §93.158(a)(5) and, for local air quality analysis, also meet 40 C.F.R. §93.158(b);

4. For carbon monoxide or PM₁₀, where the state agency primarily responsible for the applicable SIP determines (a) that an areawide air quality modeling analysis is not needed, the total of direct and indirect emissions from the action meet the requirements specified in 40 C.F.R. §93.158(b) based on local air quality modeling analysis; or (b) that an areawide air quality analysis is appropriate and that a local air quality analysis is not needed, the total of direct and indirect emissions from the action meet the requirements of 40 C.F.R. §93.158(b) based on areawide modeling or meet the requirements of 40 C.F.R. §93.158(a)(5); or

5. For ozone or nitrogen dioxide, and for purposes of 40 C.F.R. §93.158(a)(3)(ii) and (a)(3)(ii), each portion of the action -- or the action as a whole -- meets any of the following requirements:

(a) Where EPA has approved a revision to an area's attainment or maintenance demonstration after 1990 and the state makes a determination as provided in 40 C.F.R. §93.158(a)(5)(i)(A), or where the state makes a commitment as provided in 40 C.F.R. §93.158(a)(5)(i)(B):

(i) The total of direct and indirect emissions from the action (or portion thereof) is determined and documented by the state agency primarily responsible for the applicable SIP to result in a level of emissions which, together with all other emissions in the nonattainment (or maintenance) area, would not exceed the emissions budgets specified in the applicable SIP;

(ii) The total of direct and indirect emissions from the action (or portion thereof) is determined by the state agency responsible for the applicable SIP to result in a level of emissions which, together with all other emissions in the nonattainment (or maintenance) area, would exceed an emissions budget specified in the applicable SIP and the state governor or designee makes a written commitment to EPA which includes the following:

(1) A specific schedule for adoption and submittal of a revision to the SIP which would achieve the needed emission reductions before emissions from the federal action would occur;

(2) Identification of specific measures for incorporation into the SIP which would result in a level of emissions which, together with all other emissions in the nonattainment or maintenance area, would not exceed any emissions budget specified in the applicable SIP;

(3) A demonstration that all existing applicable SIP requirements are being implemented in the area for the pollutants affected by the federal action, and that local authority to implement additional requirements has been fully pursued;

(4) A determination that the responsible federal agencies have required all reasonable mitigation measures associated with their action; and

(5) Written documentation including all air quality analyses supporting the conformity determination;

(iii) Where a federal agency made a conformity determination based on a state commitment as described above, such a state commitment is automatically deemed a call for a SIP revision by EPA under Clean Air Act §110(k)(5), effective on the date of the federal conformity determination and requiring a response within 18 months or any shorter time within which the state commits to revise the applicable SIP;

(b) The action (or portion thereof), as determined by the MPO, is specifically included in a current transportation plan and transportation improvement program (TIP) which have been found to conform to the applicable SIP;

(c) The action (or portion thereof) fully offsets its emissions within the same nonattainment or maintenance area through a revision to the applicable SIP or an equally enforceable measure that effects

precursor, an action must comply (or be consistent) with all specific SIP requirements and all milestones contained in the SIP. In addition, the action must meet one or a combination of criteria set forth in 40 C.F.R. §93.158(a)(1)-(5).⁸¹

Before a conformity determination can be made, all required analyses and necessary mitigation requirements must be identified.⁸² No action may be determined to be in conformity unless the total of direct and indirect emissions from the action is in compliance or is consistent with SIP requirements and milestones.⁸³

11. Procedures for Conformity Determinations of General Federal Actions

When an agency makes a general conformity determination it must perform various types of conformity analyses,⁸⁴ which must follow the criteria set forth in the

emission reductions equal to or greater than the total of direct and indirect emissions from the action so that there is no net increase in emissions of that pollutant;

(d) Where EPA has not approved a revision to the relevant SIP attainment or maintenance demonstration since 1990, the total of direct and indirect emissions from the action for the future years do not increase emissions with respect to the baseline emissions:

(i) The baseline emissions reflect the historical activity levels that occurred in the geographic area affected by the proposed federal action during (1) calendar year 1990; (2) the calendar year that is the basis for the classification (or, where the classification is based on multiple years, the most representative year), if a classification is promulgated in 40 C.F.R. Part 81; or (3) the year of the baseline inventory in the PM-10 applicable SIP;

(ii) The baseline emissions are the total of direct and indirect emissions calculated for the future years using historic activity levels and appropriate emission factors for the future years; or

(e) Where the action involves regional water and/or wastewater projects, such projects are sized to meet only the needs of population projections that are in the applicable SIP.

⁸¹ *Id.*

⁸² *Id.* at §93.158(d). The areawide and/or local air quality modeling analyses must (1) meet the requirements in 40 C.F.R. §93.159; and (2) show that the action does not (a) cause or contribute to any new violation of any standard in any area; or (b) increase the frequency or severity of any existing violation of any standard in any area. *Id.* at §93.158(b).

⁸³ *Id.* at §93.158(c).

⁸⁴ *Id.* at §93.158(c).

⁸⁴ *Id.* at §93.159. Each analysis required under this section must be based on the latest planning assumptions. *Id.* at §93.159(a). Planning assumptions must be derived from the estimates of population, employment, travel, and congestion most recently approved by the MPO. Any revisions to these estimates must be approved by the MPO or other authorized agency. *Id.* at §93.159(a)(1) and (2). Analyses must be based on the latest and most accurate emission estimation techniques available, unless they are inappropriate. If inappropriate -- and if the EPA Regional Administrator gives written approval --

regulation. These analyses will ultimately be used to make the conformity determination.

Analyses must be done for mobile sources,⁸⁵ stationary sources,⁸⁶ and future year

emissions.⁸⁷ An air quality modeling analysis must also be completed.⁸⁸

12. Mitigation of Air Quality Impacts

Mitigation measures must be identified and the process for implementing and enforcing them must be described in the conformity determination.⁸⁹ An implementation schedule containing explicit timelines must be included.⁹⁰ A federal agency may not make a conformity determination until it secures written commitments from those who will

techniques may be modified or another technique may be substituted on either a case-by-case basis or a generic basis for a specific federal agency program. *Id.* at §93.159(b).

⁸⁵ For motor vehicle emissions, EPA's most current emissions model which is available for use in preparing or revising SIPs must be used. *Id.* at §93.159(b)(1). This model may vary from state to state. *Id.* When it issues a new motor vehicle emissions model, EPA must publish a notice of availability in the Federal Register and must give a three-month grace period during which the previous model may still be used. *Id.* at §93.159(b)(1)(i) and (ii). Conformity analyses which were begun during the grace period or no more than three years before publication of the notice of availability may continue to use the previous version. *Id.* at §93.159(b)(1)(ii).

⁸⁶ The latest emission factors specified by EPA in the COMPILATION OF AIR POLLUTANT EMISSIONS FACTORS (AP-42) must be used for conformity analyses for non-motor vehicle sources, including stationary and area source emissions. *Id.* at §93.159(b)(2). If more accurate data is available, such as stack test data from stationary sources which are part of the conformity analysis, such data should be used instead. *Id.*

⁸⁷ Analyses done under 40 C.F.R. §93.159(d) are to be based on the total of direct and indirect emissions from the federal action. They must reflect emission scenarios which are expected to occur in each of the following time periods:

(1) The Clean Air Act-mandated attainment year of, if applicable, the farthest year for which emissions are projected in the maintenance plan;

(2) The year during which the total of direct and indirect emissions from the action is expected to be greatest on an annual basis; and

(3) Any year for which the applicable SIP specifies an emissions budget.

⁸⁸ Air quality modeling analyses are to be based on applicable air quality models, databases, and other requirements specified in the most recent version of the GUIDELINE ON AIR QUALITY MODELS (REVISED) (1986) and its supplements (the applicable supplement is EPA Publication No. 450/2-78-027R) unless the guideline techniques are inappropriate. *Id.* at §93.159(c)(1). If inappropriate, the model may be modified or another model may be substituted on a case-by-case basis. Where appropriate, and EPA gives written approval for any modification or substitution, another model may be substituted on a generic basis for a specific federal agency program. *Id.*

⁸⁹ *Id.* at §93.160(a).

⁹⁰ *Id.*

actually implement the mitigation measures⁹¹ -- for example, from the state when such measures are included in a SIP. Those who voluntarily commit to mitigation measures to help a federal agency achieve a positive conformity determination must comply with the commitments they make.⁹² Mitigation measures may be modified when necessary because of changed circumstances, but new mitigation measures must continue to support the conformity determination.⁹³

⁹¹ *Id.* at §93.160(b).

⁹² *Id.* at §93.160(c). SIP revisions must require written commitments to mitigation measures before a positive conformity determination can be made. They must also require such commitments to be fulfilled. *Id.* at §93.160(f). After SIP revisions are completed and states adopt general conformity rules, any agreements necessary for a conformity determination, including mitigation measures, become both state and federally enforceable. *Id.* at §93.160(g). Mitigation measures are enforceable through the SIP against anyone who has agreed to mitigate direct and indirect emissions associated with a federal action in connection with a conformity determination. *Id.*

⁹³ *Id.* at §93.160(e). Where the federal agency licenses, permits or otherwise approves actions of other governmental or private entities, such items must be conditioned upon implementation of mitigation measures identified in the conformity determination. *Id.* at §93.160(d). Proposed changes are subject to the reporting requirements of 40 C.F.R. §93.156, and must be issued for public comment before finalization. *Id.*

CHAPTER IV. GENERAL CONFORMITY GUIDANCE DEVELOPED BY THE DEPARTMENT OF DEFENSE

DOD guidance regarding compliance by military installations with the general conformity rule is still evolving as of this writing. Each military department is currently circulating draft guidance on conformity, however, with an eye toward final publication as soon as possible. The draft guidance for each department is outlined below.⁹⁴ Differences, where they exist, are noted.

A. The Air Force's Draft Guidance: *U.S. Air Force Conformity Guide*

1. The Preamble

The preamble to the Air Force draft guidance is intended to be a user-friendly list of questions geared toward helping its users find answers to the more obvious generic compliance questions about the General Conformity Rule.⁹⁵ The questions ask:

1. What is conformity?
2. Who is responsible for conformity?
3. Where do I start?
4. Why, when, where, and with whom do I talk about conformity?
5. What is included in a conformity analysis?
6. If I don't conform, then what?
7. What if my case is unique?
8. Where can I go for help if I can't do the analysis alone?⁹⁶

2. Background and Overview of General Conformity

⁹⁴ Each military department's draft guidance is, of course, subject to change prior to final publication. The final versions of the guidance documents, rather than the descriptions given in this thesis, should be consulted by those interested in learning more about each department's rules for general conformity compliance.

⁹⁵ FIRST DRAFT REPORT, U.S. AIR FORCE CONFORMITY GUIDE, Directorate of Environmental Quality, HQ USAF/CEV, Washington, DC, (February 1995) at vii [hereinafter AF DRAFT].

⁹⁶ *Id.*

The first section of the Air Force draft guidance gives capsule summaries of Title I of the Clean Air Act and the statutory requirements of general conformity. It describes the creation of National Ambient Air Quality Standards (NAAQS) and the designation of areas as attainment, nonattainment or maintenance areas. It also emphasizes the general requirement to review Air Force activities carefully.⁹⁷

a. Transportation Conformity

The draft guidance briefly describes transportation conformity in section 1.4 and notes that there can be some interaction between transportation and general conformity. Specifically, when an action or portion of the action conforms to the transportation conformity rule, that action or portion is presumed to conform to the general conformity requirement.⁹⁸

b. Air Force Activities and Responsibilities

Section 1.5 lists several levels of Air Force responsibility and the duties of each with regard to general conformity determinations.⁹⁹

(1) Installation Level Responsibilities

At the installation level, several key players have conformity responsibilities. The Environmental Flight (EF)¹⁰⁰ is the central contact point for collecting and collating

⁹⁷ *Id.* at 1-1. The draft guidance emphasizes that "[a]s part of the planning process, Air Staff personnel and installation planners will need to analyze each Air Force action . . . to ensure conformity. . . ." and that creation of "an exact step-by-step manual on conformity determinations is not appropriate" because of the state-specific nature of conformity requirements in applicable EPA-approved SIPs. *Id.*

⁹⁸ *Id.* at 1-2. The draft guidance gives the example of a planned airport expansion for which emissions from vehicles commuting to and from the airport had already been estimated and incorporated into the TIP and had been found to conform. Such emissions, says the guidance, would not have to be analyzed for general conformity. *Id.*

⁹⁹ *Id.* at 1-2 to 1-4.

¹⁰⁰ At most Air Force bases, the Environmental Flight is a division of the base civil engineering squadron. Its responsibilities encompass nearly every environmental compliance issue facing an installation. Examples include oversight of hazardous waste storage and disposal, solid waste management,

emissions information from the various information sources contacted throughout the conformity determination process. The EF should be aware of major emission sources for the purposes of conformity offsets.¹⁰¹ Other installation-level offices provide information the EF with the information it needs to complete the conformity analysis.¹⁰²

(2) Higher Headquarters Responsibilities

underground storage tank oversight, air emissions oversight, response to hazardous spills, drafting and renewal of disposal permits, and performing (or contracting for performance of) various types of air and water compliance monitoring, etc.

¹⁰¹ *Id.* at 1-3.

¹⁰² *Id.* at 1-3 to 1-4. The Base Civil Engineer (BCE) -- whose responsibilities include maintenance of installation structures, fuel handling, equipment storage, and operation and maintenance of base heating and fuel plants -- should provide information regarding facility maintenance (steam boilers, furnaces, incinerators) and construction requirements. The Base Staff Judge Advocate (SJA) -- the attorney who heads the base's legal office -- is responsible for providing guidance regarding compliance with legal requirements and coordinating interpretations of those requirements with higher headquarters as necessary to ensure Air Force consistency. The Bioenvironmental Engineering Office (BEE), an organization which generally falls under the Medical Group and which is responsible for monitoring ambient air quality and preparing the installation air emission inventory, should provide information on air quality sampling techniques and baseline air quality data for the installation. The Medical Group, which is responsible for operation of the installation's pathological incinerators, should provide information on the operation of medical incinerator emissions and volume of material incinerated. The Fuels Management Office, which is usually part of the Base Supply Department, is responsible for the operation of all fuel handling, transportation (tanks and/or pipelines), and storage facilities on the installation. It should provide information on the type and quantity of fuel used at the installation for aviation and vehicles. The Automotive Maintenance Office should provide information on the number and types of vehicles used, average miles traveled, and fuel consumption. Maintenance squadrons should provide information on the number of Aerospace Ground Equipment (AGE) required to support particular aircraft. They may also have information concerning engine run-ups for maintenance procedures. The Base Exchange (BX), which often runs gas stations on Air Force installations, may be another source of information on fuel consumption and amount stored on base when determining volatile organic compound (VOC) emissions and possible offsets. BXs may be an additional source of information on incinerator and boiler emissions as well. Airfield Management should provide information on aircraft operations, including take offs and landings, operating conditions, numbers of aircraft, and length of sorties. The base Personnel Office should provide information on the increased number of people that will be associated with a proposed action. Operations should provide information on estimating the changes in the number of personnel and equipment resulting from changes in the number of aircraft at the installation. Public Affairs should provide assistance with the public reporting requirements of conformity compliance.

The Air Force Center for Environmental Excellence (AFCEE)¹⁰³ is the technical resource for conformity determinations. AFCEE contracts to help installations get the technical expertise to perform conformity determinations.¹⁰⁴

The various Air Force major commands (MAJCOMs) review installations' conformity determinations, process requests for contractor assistance, and provide mission change data such as number of aircraft, etc.¹⁰⁵ The Civil Engineer at Headquarters, U.S. Air Force, (HQ USAF/CE) next reviews conformity determinations and forwards them to The Assistant Secretary of the Air Force for Manpower Reserve Affairs, Installations and Environment (SAF/MIQ), who is the final approval authority for all Air Force conformity determinations.¹⁰⁶

3. Conformity in Exempt or *De Minimis* Categories

Chapter 2.0 of the Air Force draft guidance and reiterates the statutory and regulatory conformity requirement and notes that since EPA's specific guidelines and procedures for determining whether federal actions conform to SIPs are not clear, installations should coordinate with other Air Force, state and EPA officials.¹⁰⁷

¹⁰³ AFCEE, a Forward Operating Agency (FOA) reporting directly to HQ USAF's Civil Engineer (AF/CEV), is a service center located at Brooks AFB, Texas, which provides environmental and construction services to DOD or other federal agencies who request assistance in these areas. AFCEE assists installations which want contractors to perform services such as environmental remediation, conservation and planning, construction management, or design assistance, but doesn't want the responsibility for managing the contract. It currently has approximately \$3.1 billion in contractor capacity available. Approximately 450 military and 350 civilian engineers and scientists are assigned to AFCEE. Telephone interview with Lieutenant Colonel Dean C. Rodgers, Staff Judge Advocate, AFCEE/JA, August 4, 1995.

¹⁰⁴ AF DRAFT, *supra* note 95, at 1-3.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1-2.

¹⁰⁷ *Id.* at 2-1. This section sets out the prohibition on federal actions that (1) cause or contribute to any new violation of any standard in any area; (2) increase the frequency or severity of any existing violation of any standard in any area; or (3) delay timely attainment of any standard or any required interim emissions reductions or milestones in any area. *Id.*

a. Excluded Categories

Subsection 2.2 sets out the three types of action that do not require conformity determinations -- exempt actions, actions presumed to conform, and clearly *de minimis* actions. The guidance notes that the majority of the roughly 10,000 Air Force actions per year will fall into these categories.¹⁰⁸

(1) Exempt Actions

Section 2.2.1 reiterates the actions exempted under 40 C.F.R. §93.153 (e.g., portions of actions that include major new or modified stationary sources requiring a permit under the New Source Review (NSR) or the Prevention of Significant Deterioration (PSD) programs; responses to emergencies such as military mobilizations, etc.).¹⁰⁹ The subsection goes on to suggest that installations establish local procedures to officially document these actions for internal records, though this is not required by EPA.¹¹⁰

(2) Actions Presumed to Conform

Subsection 2.2.2 notes that actions listed by the Air Force and approved by EPA as those "presumed to conform" would not be required to undergo conformity determinations. "This may be advantageous for actions frequently performed at Air Force facilities which have been repeatedly shown to conform or have other special circumstances," indicates the draft guidance.¹¹¹

(3) Clearly *De Minimis*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 2-1 to 2-2.

¹¹⁰ *Id.* at 2-2.

¹¹¹ *Id.*

"Clearly *de minimis*" actions are those which result in no emissions or increases that are so small they are considered clearly *de minimis*. The draft guidance notes that because the clearly *de minimis* categories designated by EPA are "broad and vaguely written. . . consultation with EPA, state, and Air Force air quality official is important to ensure the correct interpretation. . ." ¹¹² According to the guidance, actions with Air Force applicability that fit this category include:

- Court martial proceedings;
- Clean Air Act Title V operating permit renewals;
- Air Force instructions and guidance letters;
- Routine maintenance of administrative facilities, supporting structures, and grounds;
- Training of military police and inspection of facilities;
- Studies performed for future installation expansion projects;
- Operation of vehicles, aircraft, facility heating equipment, etc., which are similar in scope and duration to those currently occurring;
- Assessing costs for POM submittals and payroll operations;
- Aircraft and vehicle transport operations routinely occurring in a similar scope and duration to those currently occurring;
- Utilization of aircraft in operations which are similar in scope and duration to those currently occurring. ¹¹³

(4) *De Minimis*

Proposed Air Force actions that do not fall into the exempt or clearly *de minimis* categories must be analyzed to determine if their emissions will be below the EPA designated *de minimis* levels for general conformity. ¹¹⁴

(a) Not Reasonably Foreseeable

¹¹² *Id.* at 2-3.

¹¹³ *Id.* at 2-3 to 2-4.

¹¹⁴ *Id.* at 2-5. The draft guidance suggests that installations establish local procedures to document actions found to be *de minimis* for internal record keeping purposes, even though EPA does not require doing so. *Id.*

Emissions that may be caused by a federal action that cannot be specifically identified, quantified, or located at the time of the conformity determination are considered "not reasonably foreseeable" and are exempt from the determination. The guidance at section 2.3.1 notes that more than just the "obvious" emissions must be accounted for in conformity analyses.¹¹⁵

4. Conformity Determinations

Chapter 3.0 of the draft guidance describes the process for undertaking a conformity determination for federal actions which are not exempt.¹¹⁶

a. The Process

Section 3.1 of the draft guidance requires Air Force facilities to begin the process of conformity determinations by defining the nature of the Air Force action.¹¹⁷ Each phase of the action must be fully defined, including classification (e.g., military construction (MILCON) action), time, and location.¹¹⁸ Next, the Air Force must determine if the action is exempt or clearly *de minimis*. If so, no conformity determination is required.¹¹⁹

The third step is contacting appropriate agencies that can be of help in deciding whether the conformity determination will be performed by a contractor.¹²⁰ In addition to

¹¹⁵ *Id.* The draft guidance gives as an example the difficulty which sometimes occurs when calculating indirect emissions. "They can be identified and quantified," the draft guidance states, "and therefore must be included in the analysis." *Id.* A logic flow diagram "illustrating the thought process and order of events involved when evaluating an Air Force action for general conformity" appears at Figure 2-1 of the draft guidance. The diagram is reproduced herein at Appendix A.

¹¹⁶ *Id.* at 3-1. The draft guidance provides a logic flow diagram which gives a step by step sequence for conducting a conformity determination. It is reproduced herein at Appendix B.

¹¹⁷ *Id.* at 3-1.

¹¹⁸ *Id.* Air Force policy and EPA regulations prohibit segmenting the proposed action to achieve *de minimis* emission levels. *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* The appropriate Air Force offices who should be notified and consulted include the Air Staff Environmental Compliance office (AF/CEV) for compliance issues and previous experience with actions of the same classification; AFCEE/ESE for technical expertise; and SAF/MIQ for approval purposes and for Air National Guard actions).

Air Force organizations, various non-Air Force agencies should be consulted during this period, including state and local air quality agencies for applicable emissions standards, emissions inventories, and attainment status for the air quality region, as well as the local MPO for any traffic or demographic data. The draft guidance notes that although the Air Force isn't required to contact EPA until it has a draft conformity determination completed, doing so may be a good idea because regional EPA offices may have valuable information and guidance for performing the conformity determination.¹²¹

The fourth step is to determine the applicable emissions quantities from the action. This is done by (1) determining the most efficient way to estimate the emissions from the proposed action (e.g., emissions models or similar previous actions); (2) determining the emissions and documenting the results; and (3) determining if a conformity determination is required.¹²²

The fifth step in the process is the draft conformity determination. This includes choosing the "most efficient" method of conforming with the applicable SIP; preparing the determination that shows how the chosen method achieves conformity with the SIP; submitting the draft analysis to SAF/MIQ, AF/CEV and AFC EE; and public participation requirements.¹²³

The final step, under the draft guidance, is a final conformity determination. This incorporates any changes required by EPA or state agencies into conformity

¹²¹ *Id.* at 3-2.

¹²² *Id.* Determining if a conformity determination is required involves (1) comparing emissions data against *de minimis* emissions levels for applicable criteria pollutant(s) as determined by attainment status of the region, and then documenting the results; and (2) determining whether the action is "regionally significant." *Id.*

¹²³ *Id.*

documentation; coordinating with appropriate Air Force offices; submitting a final conformity determination; and complying with public participation requirements.¹²⁴

b. Regionally Significant Actions

Even if actions do not exceed *de minimis* rates, the action may still be "regionally significant," which requires a conformity determination.¹²⁵ To determine if an action is regionally significant, emissions from the proposed action are compared to the air quality planning inventory of the region. If the amount of proposed emissions is equal or greater than 10 percent of the planning emissions inventory, the action is regionally significant. If less than 10 percent, the action still does not require a conformity determination.¹²⁶

c. Timelines and Frequency

Section 3.3 estimates (perhaps optimistically) that coordination with AF/CEV, the MPO, and the EPA regional office should take about one week each. The emissions analysis is estimated as taking one week from the time the emissions data is gathered.¹²⁷ Section 3.4 notes the five-year automatic expiration of conformity determinations. If the action is still ongoing at the five year point, the agency will not have to do a new conformity determination so long as the activity hasn't substantially changed in scope.¹²⁸

5. Emissions Determinations

¹²⁴ *Id.*

¹²⁵ *Id.* Section 3.2 of the draft guidance defines a regionally significant action as "a general Federal action representing 10 percent or more of a nonattainment or maintenance area's total emissions of any criteria pollutant." *Id.*

¹²⁶ AF DRAFT, *supra* note 95, at 3-2 to 3-3.

¹²⁷ *Id.* at 3-3. Writing the statement of work and contractor bid time takes between three to six months. Writing the draft conformity determination takes between one to two months. The SAF/MIQ approval period is given as two weeks. *Id.*

¹²⁸ *Id.* at 3-4.

Under Chapter 4.0, installations must use only EPA-approved modeling techniques to show an action will positively conform to the SIP.¹²⁹

a. Background on Modeling Techniques

This subsection describes the publication of EPA's THE GUIDELINE ON AIR QUALITY MODELS in April 1978. It notes that the guideline serves as the basis for identifying those techniques and databases EPA considers acceptable.¹³⁰

b. Methods of Conformity

Five methods of EPA-approved means of satisfying conformity criteria are described the draft guidance's Table 4.1:

¹²⁹ *Id.* at 4-1. According to the draft guidance, there are several different methods of showing positive conformity and several different models which can be used. The remainder of this chapter in the guidance discusses the various options. *Id.* Section 4.3 of the draft guidance notes that the analysis required for a conformity determination must be based on the latest MPO-approved planning assumptions and on the latest and most accurate EPA-approved emissions estimation techniques available. *Id.* at 4-4. For non-motor vehicle sources, including stationary and areawide sources, the latest emissions factors specified by EPA in the COMPILATION OF AIR POLLUTANT EMISSION FACTORS AP-42 must be used unless more accurate data (such as actual stack testing results) are available. For motor vehicle emissions, the most current model specified by EPA must be used. The air quality analysis required must be based upon the applicable air quality models, databases, and other requirements specified in the most recent version of GUIDELINE ON AIR QUALITY MODELS (REVISED) (EPA publication no. 450/2-78-027R). *Id.*

¹³⁰ *Id.*

Methods for Satisfying Conformity Criteria¹³¹

| | |
|-----------------|---|
| Method 1 | Emissions of any criteria pollutant resulting from the action must be specifically identified and accounted for in the applicable SIP's attainment or maintenance demonstration. |
| Method 2 | <p>A. Areawide and local air quality modeling must show direct and indirect emissions resulting from the action would not cause or contribute to any new violation or increase the severity of an existing violation, <u>or</u></p> <p>B. Local air quality modeling must show direct and indirect emissions resulting from the action would not cause or contribute to any new violation or increase the severity of an existing violation. In addition, one of the Method 5 criteria must be met.</p> |
| Method 3 | Local air modeling (unless only areawide modeling is required by the state) must show direct and indirect emissions resulting from the action would not cause or contribute to any new violation or increase the severity of an existing violation. |
| Method 4 | Emissions must be fully offset through reductions elsewhere in the nonattainment or maintenance area. |
| Method 5 | <p>A. Emissions from the action plus all other emissions in the nonattainment or maintenance area must not exceed the emissions budget specified in the applicable SIP. Alternatively, if the emissions budget is exceeded, the state governor may make a written commitment to EPA including a promise to make SIP revisions that will lower emissions to within the emissions budget, <u>or</u></p> <p>B. The action is specifically included in a current conforming transportation plan, <u>or</u></p> <p>C. Emissions from the action do not increase total emissions with respect to a baseline, <u>or</u></p> <p>D. The SIP is revised so emissions from the action are offset within that nonattainment or maintenance area to achieve no net increase, <u>or</u></p> <p>E. If the action involves regional water and/or wastewater projects, the project must be sized to meet only the needs of the population projections in the SIP.</p> |

The guidance's Table 4.2 explains the different conformity method options in a quick pollutant-specific reference matrix format:

¹³¹ *Id.* at 4-2.

Conformity Methods Matrix¹³²

| Method | Lead | CO | Ozone | PM ₁₀ | SO ₂ | NO ₂ |
|-----------------|------|----|-------|------------------|-----------------|-----------------|
| 1 | ** | ** | ** | ** | ** | ** |
| 2A | ** | ** | | ** | ** | |
| 2B ¹ | ** | ** | | ** | ** | |
| 3 | | ** | | ** | | |
| 4 | | | ** | | | ** |
| 5 | | ** | ** | ** | ** | ** |

¹If Method 2B is chosen, one of the Method 5 criteria must be met.

One of the simplest ways for the Air Force to achieve conformity, according to the draft guidance, is to have the proposed action included in the state's SIP.¹³³ Another method, the emissions offset option,¹³⁴ requires that there be no net increase in emissions from the proposed action. Use of a baseline is a third option to achieve conformity. The baseline emissions reflects the historical activity levels that occurred in the geographic area affected by the proposed Air Force action. This method demonstrates conformity by showing that emissions from the action will not increase total emissions with respect to an EPA-accepted baseline.¹³⁵

¹³² *Id.*

¹³³ *Id.* at 4-3. Because the SIP must be approved by EPA, the draft guidance reminds the reader that this method of achieving conformity requires significant coordination and considerable lead time. To avoid a delay, the guidance suggests installations coordinate with Air Staff personnel and SAF/MIQ for assistance in negotiating for the state to provide a written commitment to revise the SIP to include the project. This will allow the project to proceed "as soon as the additional emissions reductions the state has committed to have occurred." *Id.*

¹³⁴ Emission offsets, for conformity purposes, are "emissions reductions which are quantifiable, consistent with the applicable SIP attainment and reasonable further progress demonstrations, surplus to reductions required by, and credited to, other applicable SIP provisions, enforceable at both the State and Federal levels, and permanent within the timeframe specified in the program." 40 C.F.R. § 93.152.

¹³⁵ *Id.* Baseline levels are determined for (1) calendar year 1990; (2) the calendar year for which the area was designated a nonattainment area or maintenance area, or (3) the year of the baseline inventory in the PM₁₀ applicable SIP. *Id.*

c. Emission Rates for Typical Air Force Activities

Section 4.4 focuses on the emissions from typical Air Force activities that are likely to require conformity determinations.¹³⁶

(1) Aircraft Operations¹³⁷

Aircraft emissions are likely to generate the highest percentage of criteria pollutant emissions at most Air Force installations, according to the draft guidance.¹³⁸ Section 4.4.1 is broken down into several specific subsections:

(a) **Flying Operations.** This category includes activities occurring during the various phases of aircraft flight, such as takeoffs and landings.¹³⁹

(b) **Aircraft Ground Operations.** This category measures emissions of aircraft engines prior to takeoff under various conditions.¹⁴⁰

¹³⁶ *Id.* The draft guidance notes that the emissions inventories, which are estimates derived from averaged emissions from several Air Combat Command (ACC) and Air Education and Training Command (AETC) installations, are "only rough estimates and cannot be used in any documented analysis of applicability or conformity determination." *Id.* The purpose of the estimates is to suggest to installations where their emissions are likely to be found and the probable relative amount of emissions. *Id.* The draft guidance further cautions: "... [C]onformity determinations are not based on rough estimates, they must be exact calculations of emissions from the Air Force action and must be calculated using the latest EPA approved modeling techniques." *Id.*

¹³⁷ According to EPA, it is a state's decision as to whether emissions from aircraft operations are accounted for in the SIP emissions budget as part of the planned growth of an area. "A conformity determination is necessary for any aircraft emissions that are above *de minimis* levels, regionally significant, or not otherwise exempt. Inclusion in the SIP emissions budget is one of the criteria that can be used for demonstrating conformity after it is determined that a conformity determination is needed." CONFORMITY GUIDANCE, *supra* note 52, at 7.

¹³⁸ AF DRAFT, *supra* note 95, at 4-4. The draft guidance give as examples the following: "... any Air Force action involving BRAC [Base Realignment and Closure] activities will result in a change in numbers and types of aircraft at the installation. As a result, these aircraft additions or losses will constitute the highest rate of change in emissions in making any conformity determination. In addition to BRAC activities, any Air Force structure, personnel or equipment changes may also call for the movement of aircraft on or off the Air Force installation." *Id.* at 4-4 to 4-5.

¹³⁹ Where aircraft are to be realigned or relocated as part of the proposed Air Force action, their types (e.g., B-52s, F-16s, etc.) are used to calculate emission rates. Emissions from takeoffs and landings for individual aircraft are calculated using AP-42, VOLUME II EMISSIONS FACTORS by type of aircraft operation such as taxi/idle, takeoff, climb-out, and approach. Emissions can then be calculated using the time an aircraft spends in each mode, the number of engines on the aircraft, the number of operations, and the modal emission rate. *Id.* at 4-5.

(c) **Aerospace Ground Equipment (AGE).** AGE is

internal combustion and turbine engines used for ground support of aircraft, and consists of all powered aircraft support equipment except refueling trucks, aircraft towing tractors and K-loaders.¹⁴¹

(d) **Painting Emissions.** This category includes "surface coating" -- i.e., all applications of paint, primer, stain, etc., to surfaces of aircraft, vehicles, missiles or buildings, as well as the use of related products (thinners, solvents, etc.).¹⁴²

(e) **Incinerator Emissions.** Incinerators included in this subcategory are those burning municipal waste, medical waste, and security materials.¹⁴³

(f) **Fire Training Area Emissions.** Fire fighting practice pits are containment areas filled with a specified amount of fuel and materials to be

¹⁴⁰ *Id.* This subsection notes that aircraft engines are normally run at various power settings under different conditions. The power settings to be used when calculating emissions are idle, approach, military rated thrust, and takeoff thrust. The percent of total installation emissions from "ground ops" sources is:

| SOURCE | CO | NOx | SOx | PM ₁₀ | VOC | LEAD |
|------------|-----|-----|-----|------------------|-----|------|
| Ground Ops | 50% | 30% | 40% | 15% | 15% | 0% |

¹⁴¹ *Id.* Load and emission factors for AGE are to be determined by referring to EPA's NON-ROAD ENGINE AND VEHICLE EMISSION STUDY. Fuels which should be evaluated include JP-4, JP-8, MOGAS fuel and diesel. The estimated percent of total installation emissions from AGE are:

| SOURCE | CO | NOx | SOx | PM ₁₀ | VOC | LEAD |
|--------|-----|-----|-----|------------------|-----|------|
| AGE | 30% | 50% | 10% | 15% | 20% | 0% |

¹⁴² *Id.* at 4-5 to 4-6. The draft guidance directs the reader to the installation's previous twelve-month transaction records for all 8010 stock class items to ascertain the amount of surface coatings used. The estimated percent of total installation emissions attributable to painting are:

| SOURCE | CO | NOx | SOx | PM ₁₀ | VOC | LEAD |
|----------|----|-----|-----|------------------|-----|------|
| Painting | 0% | 0% | 0% | 15% | 20% | 95% |

¹⁴³ *Id.* at 4-6. The estimated percent of emissions attributable to incineration are:

| SOURCE | CO | NOx | SOx | PM ₁₀ | VOC | LEAD |
|--------------|----------|----------|-----|------------------|----------|------|
| Incinerators | under 5% | under 5% | 15% | under 5% | under 5% | 10% |

ignited. Firefighters in training then extinguish the blaze, using various methods depending upon the type of burning fuel and materials.¹⁴⁴

(g) **Heating and Power Production.** All power and heat production for base facilities and housing units are included under this subsection.¹⁴⁵

(h) **Fuel Evaporative Emissions.** Under this subsection come all aboveground and underground storage tanks (USTs) which store base fuels.¹⁴⁶

(i) **Construction.** New construction, demolition, and refurbishment of existing facilities and utilities are considered area source emissions, and should be considered in the evaluation.¹⁴⁷

(j) **Vehicle Emissions.** Motor vehicles include all vehicles using the roads of the installation, including government owned vehicles (GOVs) and privately owned vehicles (POVs).¹⁴⁸

¹⁴⁴ *Id.* The estimated percent of total installation emissions from fire training are:

| SOURCE | CO | NOx | SOx | PM ₁₀ | VOC | LEAD |
|---------------|-----|----------|----------|------------------|-----|------|
| Fire training | 20% | under 5% | under 5% | 30% | 10% | 0% |

¹⁴⁵ *Id.* Pollutants from the total amounts of each type of fuel utilized (e.g., heating oil, natural gas, diesel) must be calculated. Oil's SO₂ factor will vary depending on the oil's sulfur content. For emissions from central heating plants, the input capacity for each boiler should be determined. The percent of total installation emissions from heating and power production are:

| SOURCE | CO | NOx | SOx | PM ₁₀ | VOC | LEAD |
|------------|-----|-----|-----|------------------|-----|------|
| Heat/Power | 20% | 30% | 40% | 25% | 5% | 0% |

¹⁴⁶ *Id.* at 4-6 to 4-7. Evaluation should include calculating the total hydrocarbon emissions for filling USTs, UST breathing, vehicle refueling, and spillage. The percent of total installation emissions are:

| SOURCE | CO | NOx | SOx | PM ₁₀ | VOC | LEAD |
|------------|----|-----|-----|------------------|-----|------|
| Fuel evap. | 0% | 0% | 0% | 0% | 50% | 0% |

¹⁴⁷ *Id.* at 4-7. Construction activities to be analyzed include demolition, grading and excavation, heavy duty equipment operating on paved and unpaved roads, fuels systems and road construction, and new facility and housing construction. *Id.* Vehicles supporting the construction, however, are considered as mobile sources. Appendix 9 of the CEQA AIR QUALITY HANDBOOK, notes the draft guidance, should be used to estimate construction emissions by type of activity. Activity emissions are then aggregated to arrive at an emissions estimate for the entire project. the total emissions from the action are then divided equally over the calendar year. *Id.*

¹⁴⁸ *Id.* Examples of typical GOVs are passenger cars, utility and heavy duty trucks (3/4 ton and greater in size), sedans, station wagons, buses, and communication vans. *Id.*

(2) Mitigation

Mitigation methods “reduce the potential impact of an action so that it will produce less emissions.”¹⁴⁹ An action that does not initially conform can end up with a positive conformity determination with mitigation methods. Mitigation methods do not have to be in place when the conformity determination is made, but there must be an explicit implementation schedule, a written commitment to apply specific mitigation methods, and EPA approval of the action conditioned upon implementation of mitigation methods.¹⁵⁰

6. Community Relations and Other Special Issues

Chapter 5 of the Air Force’s draft guidance discusses a variety of other issues, including:

a. Role of the Metropolitan Planning Organization (MPO)

Subsection 5.2 identifies and generally describes the MPO and its role in regard to conformity determinations. It directs Air Force installations to notify the applicable MPO within 30 days of completing a draft and a final conformity determination, and to provide the MPO a copy.¹⁵¹

b. Classified Actions

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 4-7 to 4-8. At Air Force installations, strategies to reduce motor vehicle emissions include vehicle inspection and maintenance programs, vapor recovery technology, transportation control methods, and use of clean fuel vehicles. For emissions from stationary sources such as boilers and paint booths, the guidance suggests (1) installing high efficiency carbon adsorbing systems on paint booths and using low VOC content paints and coatings to reduce ozone precursors, and (2) installing low NOx burners for residential heating systems, using alternative fuel boilers such as natural gas, and removing pollutants from stack emissions. *Id.* at 4-8.

¹⁵¹ *Id.* at 5-1 to 5-2.

The unique nature of military operations sometimes necessitates classifying information for security and national defense reasons. Subsection 5.3 lists two "generic situations" where classification of conformity documentation may be required -- (1) where the proposed action itself is classified and therefore any conformity determination concerning the action is classified, or (2) where the proposed action is not classified, but certain aspects of the required documentation is classified and must be protected with a security classification.¹⁵²

Where the whole proposed action is properly classified, the entire conformity determination process may be safeguarded using classification procedures. Only persons at the state or EPA with appropriate security clearances would be permitted to review and approve the conformity determination.¹⁵³ Where only part of the conformity determination is classified, the conformity documentation is organized by putting the classified material into a separate classified attachment. The remaining unclassified portions can then be made available to the public.¹⁵⁴

c. Determining Conformity when Multiple Federal Agencies are Involved

Subsection 5.4 of the draft guidance provides that where two different federal agencies have jurisdiction over the same project, one agency cannot rely on the fact that the other made a positive conformity determination and forego making one of its own. The second agency must either make its own conformity determination or choose to adopt

¹⁵² *Id.* at 5-2.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

by reference the first agency's analysis, assumptions and conclusions (so long as the analysis includes the entire scope of the project).

Where the Air Force leases an installation to another federal agency and maintains a continuing authority over the installation throughout the life of the lease, the Air Force is responsible for making a conformity determination for the actions that will occur on the installation as a result of the lease.¹⁵⁵ Where only a portion of the installation is leased for a specific activity, such as for a municipal wastewater treatment plant, the Air Force is responsible for making the conformity determination for the direct and indirect emissions associated with the plant's everyday operation.¹⁵⁶ In situations where there is overlapping jurisdiction between two branches of military service, the draft guidance directs readers to consult with SAF/MIQ.¹⁵⁷

d. NEPA and its Relationship with Conformity

(1) Conformity in NEPA Documentation

EPA does not require integration of conformity into NEPA documentation, although federal agencies may do so if they choose. The Air Force has made the decision to keep conformity determinations "essentially separate" from NEPA EAs and EISs.¹⁵⁸ Even so, the guidance advises, NEPA and conformity documentation should be prepared concurrently to ensure all aspects of required environmental compliance are analyzed in a timely manner.

¹⁵⁵ *Id.* at 5-3. Where another agency supports the activity or a portion thereof, it too must make a conformity determination for the portion of the activity for which it is responsible. *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 5-4.

With regard to alternatives proposed in EISs, while EPA does not require a conformity analysis for each one, the Air Force wants its installations to do an analysis of applicability on proposed alternatives to "ensure the alternatives are viable with respect to conformity as well as NEPA regulations."¹⁵⁹ Moreover, where NEPA documentation is being prepared for actions in nonattainment or maintenance areas, a brief explanation of conformity and how the proposed action conforms to the SIP or FIP should be included under the section on air quality.¹⁶⁰

e. Reporting Requirements

The draft guidance notes that the appropriate air quality officials must have the opportunity to review, comment and approve conformity determinations. As such, it directs users to ensure the Air Force provides 30 days notice describing the draft conformity determination to the local MPO; the appropriate EPA regional office(s); state and local air quality agencies; the agency, office or organization designated by the state to develop the SIP; and, where applicable, affected federal land managers.¹⁶¹

f. Public Participation

The Air Force will make the draft conformity determinations, including supporting materials, available for review upon request by any person. It will place an advertisement in local daily general circulation newspapers in the area affected by the action to announce this availability and will provide 30 days after publication of the advertisement for written

¹⁵⁹ *Id.* These applicability analyses should be documented for internal Air Force records.

¹⁶⁰ *Id.* This section of the draft guidance notes that the Final Rule also amended 40 C.F.R. Part 6, which contains the NEPA regulations, by adding the requirements that (1) federal actions must conform to any SIP approved under Clean Air Act §110, and (2) for wastewater treatment plants subject to review under Subpart E of 40 C.F.R. Part 6, the responsible official shall consider the air pollution control requirements specified in Clean Air Act §316(b).

¹⁶¹ *Id.* at 5-4 to 5-5.

public comment before taking any action on the draft determination. The Air Force will document responses to all comments received, and make the comments and responses available, upon request, to any person within 30 days of the final conformity determination. The final conformity determination will be publicized by placing another advertisement in local daily general circulation newspapers within 30 days of the determination.¹⁶²

It is Air Force policy to include the local community as a partner rather than an adversary during the conformity determination process. It is important, states the draft guidance, "to establish an *atmosphere of partnership* that enables you to discover and remedy any public misconceptions that can possibly lead to citizen suits."¹⁶³ Installation planning for conformity analysis should include scheduling of required public participation and selecting technical installation or contractor personnel who can effectively communicate with the community about technical and legal issues.¹⁶⁴

7. Seeking Professional Assistance in Conformity Determinations

Conformity determinations can be extraordinarily complex endeavors, and not every installation will have personnel with the expertise to do them correctly. In such cases, using an experienced contractor to perform the conformity determination makes sense. Section 6.0 of the Air Force draft guidance gives a brief overview of the

¹⁶² *Id.* at 5-5.

¹⁶³ *Id.* at 5-6. This is the rationale for involving the installation Public Affairs Office and the Staff Judge Advocate as early in the conformity process as possible.

¹⁶⁴ *Id.* at 5-5 to 5-6. If a contractor is required to perform community relations activities, such requirements should be addressed in his or her contract's Statement of Work.

contracting process and contractor management when an installation decides to hire outside help to do a conformity determination.¹⁶⁵

¹⁶⁵ *Id.* at 6-1. Managing such procurement actions may be very complex, requiring contract oversight activities and the review of contractor deliverables such as reports, models, methodologies, and the evaluation of cost estimates. *Id.* Selection of a contractor to perform a conformity determination must be based on specific criteria contained in the draft guidance. In order of priority, the criteria are: (1) contractor responsiveness to the solicitation requirements, (2) previous experience in directly related environmental conformity analysis work involving Air Force activities. (This also includes previous actual experience on similar projects at other locations or at the particular installation under study.); (3) personnel expertise or applicable qualifications of the team working on the proposed project; (4) evaluation of the prospective contractor's financial stability and credit rating; and (5) cost efficiency and responsiveness. *Id.* The contracting officer must provide a comprehensive statement of work (SOW) to prospective contractors for bid or proposal preparation and work. The draft guidance discusses the two major categories of government contracts -- fixed price and cost-reimbursement. The draft guidance notes that the government often prefers using fixed-price contracts because they are easier to award, require less administration and oversight, and motivate the contractor to operate efficiently and effectively. The guidance recommends, however, that a cost reimbursement or "time and materials" type contracts be employed if there is uncertainty in the proposed project requirements, because they work well in situations where it is impossible to define a SOW or prepare specifications sufficiently specific for a fixed-price contract. *Id.* at 6-4.

B. The Navy's Draft Guidance: *Draft Chief of Naval Operations Interim Guidance on Compliance with the Clean Air Act General Conformity Rule* and The Army's Draft Guidance: *Department of the Army Guide for Compliance with the General Conformity Rule of the Clean Air Act*

The Department of the Navy's and the Department of the Army's draft guidance mirror one another almost word for word, and so will be discussed here together.¹⁶⁶ Unlike the Air Force's guidance, which is service-specific in most areas, much of the Army's and Navy's guidance closely tracks the codified language of EPA's final conformity regulation. The purpose statement of the Army/Navy's draft guidance indicates it is meant:

to provide assistance to [Army or Navy] environmental planners in determining whether the Clean Air Act General Conformity Rule requires conformity determinations for proposed [Army or Navy] actions, and to provide guidance to personnel conducting such determinations.¹⁶⁷

The Navy's draft guidance applies to all Navy commands, whether afloat or ashore, that propose actions located within the geographical borders of the United States, its territories and possessions. The Army's guidance applies to all Army commands that propose actions located within the geographical borders of the United States, its territories and

¹⁶⁶ The U.S. Navy's draft conformity guidance was distributed throughout the Navy for review and comment in March 1995. The U.S. Army's draft guidance went out for review and comment in December 1994. The two draft guidance documents likely are so similar because they were drafted as a cooperative effort between Major Craig Teller, Office of the Staff Judge Advocate, Environmental Law Division, Arlington, Virginia, and Ms Alison Ling, Department of the Navy, Office of the Assistant General Counsel (Installations and Environment), Arlington, Virginia. See "Acknowledgments," DRAFT DEPARTMENT OF THE ARMY GUIDE FOR COMPLIANCE WITH THE GENERAL CONFORMITY RULE OF THE CLEAN AIR ACT, January 26, 1995, [hereinafter ARMY DRAFT GUIDANCE]. Where the Army and Navy guidance is essentially identical, it will be referred to as "Army/Navy draft guidance." Where the two draft guidance documents differ, they will be referred to individually.

¹⁶⁷ Draft Chief of Naval Operations Interim Guidance on Compliance with the Clean Air Act General Conformity Rule, March 1995, at 1 [hereinafter NAVY DRAFT GUIDANCE].

possessions. For both services, special limitations apply to actions proposed for aircraft and vessels.¹⁶⁸

The "Background" section of the Army/Navy's draft guidance gives a brief rundown of general conformity, including a definition of the term and a description the minimal differences between 40 C.F.R. Part 51 and Part 93.¹⁶⁹ The guidance notes that the General Conformity Rule does not apply to procurement actions and that EPA believes the rule should apply to some categories of procurement actions, as yet undefined.¹⁷⁰ For purposes of interpreting the present General Conformity Rule, the Army and Navy consider procurement actions not covered by the rule. Included are the acquisition of supplies or services produced or developed by non-federal entities at a location other than the federal installation. Covered procurement actions, according to the Army and Navy, include what it calls "acquisition of supplies" in the nature of construction of buildings or the provision of services such as facility support contracts on a federal installation.¹⁷¹

¹⁶⁸ *Id.* and ARMY DRAFT GUIDANCE, *supra* note 166, at 1. Before delving into the specifics of the regulation, the Army's draft guidance lists on three unnumbered pages some short answers to some "Common Questions about the General Conformity Rule":

1. What is the General Conformity Rule?
2. When was the rule published and where are the regulations found?
3. What is the effective date of the rule?
4. What does "conform to the implementation plan" mean?
5. Where does the General Conformity Rule apply?
6. How are different states implementing the rule?
7. Can states implement more stringent requirements than the federal (sic)?
8. Are there any requirements for actions taking place in attainment areas?
9. What federal actions are covered by conformity?
10. What guidance is available?

The Navy's guidance does not include these preliminary questions.

¹⁶⁹ NAVY DRAFT GUIDANCE, *supra* note 167, at 1-2, and ARMY DRAFT GUIDANCE, *supra* note 166, at 1. the Navy's "Background" section is Section C, while the Army's "Background" section is paragraph 3.

¹⁷⁰ NAVY DRAFT GUIDANCE, *supra* note 167, at 2, and ARMY DRAFT GUIDANCE, *supra* note 166, at 2.

¹⁷¹ NAVY DRAFT GUIDANCE, *supra* note 167, at 2-3, and ARMY DRAFT GUIDANCE, *supra* note 166, at 2.

The "Rule Requirements" section of the Army/Navy draft guidance closely tracks the language of 40 C.F.R. §§51.850-51.860.¹⁷² The "Applicability" subsection sets out several numbered steps for determining whether the General Conformity Rule applies.¹⁷³

- * Step 1 - Is the action located in an air quality nonattainment or maintenance area?
- * Step 2 - Does the action result in the emission of criteria pollutants?
- * Step 3 - Is the action (or portion of the action) exempt from conformity requirements?
- * Step 4 - Is the action presumed to conform?
- * Step 5 - Are the direct emissions associated with the action reasonably foreseeable?
- * Step 6 - Are the indirect emissions associated with the action reasonably foreseeable?
- * Step 7 - Can the indirect emissions associated with the action be practicably controlled due to continuing program responsibility?
- * Step 8 - Determination of total emissions.
- * Step 9 - Are the total emissions resulting from the action below *de minimis* levels?
- * Step 10 - Is the action regionally significant?

1. Calculation of Emissions

a. Aircraft and Vessels

Special limitations on aircraft and vessels emissions are included under Step 8.

According to the Army/Navy guidance:

Emissions from aircraft and vessels within certain boundaries must be included in the total emissions, regardless of whether they are regulated by the SIP. For aircraft, all emissions up to the mixing zone, generally 3,000 feet above ground level, generated within the nonattainment areas boundaries must be included in the emissions calculation. Mixing zones

¹⁷² NAVY DRAFT GUIDANCE, *supra* note 167, at 3-24, and ARMY DRAFT GUIDANCE, *supra* note 166, at 3-25. The Navy's "Rule Requirements" section is located at Section D, and the Army's is located at paragraph 4.

¹⁷³ NAVY DRAFT GUIDANCE, *supra* note 167, at 7-17, and ARMY DRAFT GUIDANCE, *supra* note 166, at 5-16. A flow chart compiled by the Navy to assist in determining applicability of the General Conformity Rule is attached at Appendix E. A Navy chart titled "Summary of Conformity Determination Criteria" is attached at Appendix F. Similar Army flow charts are located at Appendix C and Appendix D.

vary from region to region, and local meteorological data should be consulted. For vessels, all emissions generated from the shoreline outward to the seaward boundary of the territorial sea (usually 3 miles) within the nonattainment area boundaries must be included in the calculation.¹⁷⁴

b. Motor Vehicle Emissions

In determining motor vehicle emissions, the Army/Navy draft guidance requires that adjustments be made to reflect actual average vehicle occupancy rates for the installation in question, taking into account any locally required vehicle ridership requirements, the effect of special federal installation vehicle inspection and maintenance (I/M) requirements, and actual federal work days in a calendar year.¹⁷⁵ The draft regulations use a base of 240 travel days, unless special circumstances dictate some other number, for the conformity calculation.¹⁷⁶

c. Construction Phase Emissions

In calculating construction phase emissions, the Army and Navy draft regulations require that the total net combined emissions must be established separately for (1) each year of construction; (2) for each year that construction and operations overlap; and (3) for the first full year the proposed action is operating at "full-buildout."¹⁷⁷ Since emissions

¹⁷⁴ NAVY DRAFT GUIDANCE, *supra* note 167, at 15, and ARMY DRAFT GUIDANCE, *supra* note 166, at 13. The Navy guidance directs readers who want assistance in calculating emissions from aircraft or vessels to consult the Navy's Aircraft Environmental Support Office (AESO) or the Ship Environmental Support Office (SESO). *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* Only those motor vehicle emissions associated with base personnel commuting to and from work should be included in the emissions calculation. The Army/Navy guidance notes that motor vehicle use for shopping trips and other on-base errands are not emissions the federal agency can control, so they are not to be included in the emissions calculation. *Id.*

¹⁷⁷ *Id.* The term "full build-out" is not specifically defined in the draft guidance. The Army/Navy guidance notes that typically it can be assumed that a "full-buildout" operational level would be consistent throughout subsequent years. If it is expected that a year will be different, the installation should analyze such year(s) also. *Id.*

may change during various stages of a construction project, each stage is to be separately analyzed including the quarter in which it occurs.¹⁷⁸

2. Conformity Review Process and Documentation Procedures

The Army/Navy draft conformity guidance provides for a conformity review for “every [Army or Navy] action that generates emissions in a nonattainment or maintenance area.”¹⁷⁹ The reviews can be satisfied by either (1) a determination that the action is not subject to the General Conformity Rule, (2) a Record of Non-Applicability (RONA), or (3) a conformity determination.¹⁸⁰ All RONA and conformity determinations and their supporting analytical materials must be separate, “stand-alone” documents signed by the appropriate delegated official, and are to be companion documents to any NEPA documentation.¹⁸¹

A RONA must be prepared if an action is subject to the rule but exempt because it fits within one of the exemption categories listed in the Army/Navy draft guidance, or is covered under the Transportation Conformity Rule. A RONA is a “memo to the file” setting out the facts and circumstances establishing that the action is exempt or covered by the Transportation Conformity Rule.¹⁸² If the action is exempt because the calculated total emissions are below the *de minimis* levels, the assumptions and calculations used to determine the level of *de minimis* emissions must be explained in the RONA. Although they are not separately subject to the reporting or public participation requirements of the

¹⁷⁸ *Id.*

¹⁷⁹ NAVY DRAFT GUIDANCE, *supra* note 167, at 24, ARMY DRAFT GUIDANCE, *supra* note 166, at 22.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* Integration of conformity and NEPA documentation is discussed later in the draft guidance. See *infra* notes 191-211 and accompanying text.

¹⁸² *Id.* The Army draft guidance notes that a RONA is required by Army Policy, and references Army Policy Memorandum, Subject: General Conformity under the Clean Air Act, December 1994. The Navy draft guidance simply states that a RONA is required by Navy policy. *Id.*

General Conformity Rule, RONAs should be incorporated (by reference only) into any NEPA documentation being prepared.¹⁸³

Conformity determinations are required when the non-exempt emissions equal or exceed the *de minimis* levels, or are regionally significant. A conformity determination should be a "stand-alone" document containing the entire analysis and supporting materials necessary to demonstrate compliance with the conformity determination criteria, including any required mitigation measures.¹⁸⁴

The Army notes that all conformity documentation, including RONAs, will be retained at the installation level for a six-year retention period.¹⁸⁵ The Navy indicates that all of the conformity documentation identified in its guidance "shall be maintained in the project file for at least two years after the action is completed."¹⁸⁶

3. Classified Actions

The Army/Navy draft guidance indicates that actions considered classified for national security reasons are not exempt from the requirement for a conformity review.¹⁸⁷ The guidance directs that conformity documentation which contains classified information,

¹⁸³ NAVY DRAFT GUIDANCE, *supra* note 167, at 24-25, ARMY DRAFT GUIDANCE, *supra* note 166, at 22.

¹⁸⁴ NAVY DRAFT GUIDANCE, *supra* note 167, at 25, ARMY DRAFT GUIDANCE, *supra* note 166, at 22. The Army's draft guidance adds that procedures for internal review and approval of draft and final conformity determinations are given in "Policy Memorandum, Subject: General Conformity under the Clean Air Act, January 1995." The Navy draft guidance, on the other hand, indicates that all conformity determinations "shall be coordinated with and reviewed by N44E and OAGC(I&E). If a Conformity Determination associated with an action for which a [FONSI] is prepared, the determination shall be signed by N44E. If the determination is associated with an action for which an [EIS] is prepared, the Conformity Determination shall be signed by the Assistant Secretary of the Navy (Installations & Environment)." NAVY DRAFT GUIDANCE at 25.

¹⁸⁵ ARMY DRAFT GUIDANCE, *supra* note 166, at 23. Records are retained in accordance with the Modern Army Record Keeping System (MARKS). *Id.*

¹⁸⁶ NAVY DRAFT GUIDANCE, *supra* note 167, at 25.

¹⁸⁷ NAVY DRAFT GUIDANCE, *supra* note 167, at 25, ARMY DRAFT GUIDANCE, *supra* note 166, at 23.

both in draft and final versions, must be prepared, safeguarded, and disseminated in accordance with the Army/Navy requirements applicable to classified information.¹⁸⁸

Wherever possible, documents are to be organized so that classified portions are included as appendices so unclassified portions may be made available to the public. Review of classified documentation will be coordinated with "appropriate personnel" at EPA and the state as required by the General Conformity Rule.¹⁸⁹ The Army/Navy draft guidance notes that classified conformity documentation serves the same purpose as unclassified documentation, and although it does not undergo public review and comment, "it will still be part of the information package that is placed before the decision maker for the proposed action. The content of the classified conformity documentation will therefore meet the same content requirements applicable to publicly available documentation."¹⁹⁰

4. Integration with NEPA Document Preparation

Interestingly, the only area in which the wording of the Army and Navy draft guidance differs significantly is in the section regarding NEPA documentation.

a. Navy Integration

Several paragraphs of the Navy draft guidance are devoted to the issue of successfully integrating conformity and NEPA documentation. The guidance urges readers to consider conformity requirements "early in the planning process for all actions and projects."¹⁹¹ Navy conformity analysis and documentation are to be completed at the

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ NAVY DRAFT GUIDANCE, *supra* note 167, at 25-26, ARMY DRAFT GUIDANCE, *supra* note 166, at 23.

¹⁹¹ *Id.* at 26.

same time as the NEPA analysis and fully integrated into the NEPA analysis and documentation.

The Navy urges that NEPA documentation should be structured specifically to discuss compliance with the Clean Air Act, including the conformity review requirements and state and local air quality requirements.¹⁹² If a conformity determination is required, the guidance indicates it should be contained in a "stand-alone" appendix to the NEPA document.¹⁹³ This appendix should be structured for regulatory and public review so it includes a general description of the proposed action. It should contain any emissions calculations which show that emissions resulting from the action would be below *de minimis* levels.¹⁹⁴ All decisions made as part of the conformity review process should be summarized in the text of the NEPA document, with reference to the detailed supporting information and data in the appendix, as appropriate.¹⁹⁵ Special circumstances requiring a different approach than that described here require specific approval.¹⁹⁶

The NEPA documentation should also include a subheading covering compliance with other Clean Air Act requirements, such as the NAAQS. This section should include any additional analysis required by other portions of the Clean Air Act, or other analysis requested by the state to show that the Navy is in compliance with the SIP.¹⁹⁷ If this material is too bulky or technical for inclusion in the text of the NEPA documentation, it

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

should be included in a separate appendix titled "Compliance with the NAAQS and other CAA Requirements."¹⁹⁸

The Navy guidance notes that calculating a project's air emissions in accordance with the General Conformity Rule differs from the traditional air quality analyses included in NEPA documents in that: (1) the guidance indicates the definition of "indirect emissions" for conformity is more narrow than NEPA's definition of "indirect impacts;" (2) the General Conformity Rule allows exemptions and presumptions not otherwise available under traditional NEPA analysis; and (3) conformity only requires compliance with the "applicable SIP," while a NEPA analysis must identify and evaluate any federal state, and local requirements that apply to the project even if they are not included in the SIP.¹⁹⁹ Because of these differences, that can result in the presentation of differing sets of air quality data, the Navy guidance recommends that the NEPA documentation clearly identify and distinguish the conformity review decisions to avoid causing confusion among the EA or EIS reviewers.²⁰⁰

b. Army Integration

The Army's draft guidance breaks its integration discussion into three subheadings:

(1) Independent Legal Requirements of NEPA and the Clean Air Act's General Conformity Rule

The Army notes that analysis under NEPA of the air quality impacts from a proposed action will not, alone, satisfy the agency's obligations under the General Conformity Rule. Likewise, the impact analysis of air emissions for a conformity

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 26-27.

determination will not completely satisfy the agency's obligations under NEPA. The Army describes the difference between conformity and NEPA analysis in this way:

For example, conformity review is only required for the action to be taken, as opposed to the review of all options under NEPA, and is limited in scope to the criteria pollutant for which the area is in non-attainment. In addition, even where the agency determines that a proposed action may be categorically excluded under NEPA, conformity review may still be required.²⁰¹

(2) Potential Integration of the Two Processes

The Army believes the most significant area of potential integration of NEPA and conformity is in public participation.²⁰² Both NEPA and the General Conformity Rule provide for public participation while developing and reviewing the documentation involved in each process. With appropriate planning, the Army suggests, "the agency can structure the public participation elements of the processes to allow for simultaneous review and comment of the relevant documents."²⁰³ The draft guidance notes, however, that this type of integration will not always be appropriate -- for example, it will not work when an agency categorically excludes an action from NEPA analysis. Integration of the processes will be easiest where the agency prepares an EIS.²⁰⁴

Two other areas are recognized by the Army as potential areas for integration of NEPA and conformity -- (1) selection of emission reduction measures, and (2) analysis of impacts and effects.²⁰⁵ The draft guidance notes that when performing the conformity analysis, the agency may choose to develop and implement measures to reduce the impacts

²⁰¹ ARMY DRAFT GUIDANCE, *supra* note 166, at 25.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

of the action on air quality to support an exemption or conformity determination. Similarly, when conducting NEPA analysis, the agency may decide to implement measures to mitigate the adverse environmental impacts of a proposed action. The Army suggests the agency should consider whether it is appropriate to incorporate by reference in the NEPA document the mitigation measures developed to support a conformity determination or exemption.²⁰⁶

Additionally, notes the draft guidance, both NEPA and the General Conformity Rule call for the analysis of reasonably foreseeable direct and indirect effects of the action. While the analysis under the General Conformity Rule is more narrow in scope, the agency should “consider whether it is appropriate to incorporate by reference in the NEPA document’s effects section the detailed effects analysis performed in the conformity review process.”²⁰⁷

(3) Separation of General Conformity and NEPA

Documentation

According to the Army’s draft guidance, the “different legal requirements required by NEPA and the General Conformity Rule dictate that the agency conduct separate processes which result in separate documents.”²⁰⁸ The agency must maintain separate, thorough administrative records for each document to substantiate the separate administrative decisionmaking processes and conclusions of each. The two processes should be carefully coordinated, however, “given the potential for concurrent public participation, and overlapping information and analyses.”²⁰⁹ Coordination of the NEPA

²⁰⁶ *Id.* at 26.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

and conformity processes can “save both time and resources, and ultimately result in more rational, deliberative decisionmaking.”²¹⁰ The draft guidance indicates it is imperative that program and project managers devote sufficient time from the beginning to detailed planning and structuring of the administrative decision making process.²¹¹

²¹⁰ *Id.*

²¹¹ *Id.*

CHAPTER V. GENERAL CONFORMITY AND THE BASE CLOSURE PROCESS

A. The Base Closure/Conformity Quagmire

Conformity can be a particularly burdensome requirement where base closure is concerned. It "reaches far beyond the scope of normal air pollution permitting,"²¹² and gathers together emissions sources that are usually regulated under completely separate Clean Air Act programs -- i.e., mobile sources, stationary sources, and aircraft emissions.

The conformity requirement can land the base closure process in an unfortunate quagmire in that it hinges on the timing of approval of (and the assumptions made in) the applicable SIP.²¹³ If the SIP's baseline was premised on emissions from the period when an installation was fully operational and emitting its peak level of pollutants, it will have taken those emissions into account in making its emission reduction plans. This scenario allows new civilian activities to emit up to that baseline level before adversely affecting the SIP. If, however, the SIP baseline emissions were measured during a period when the installation was closed and inactive, civilian reuse can be severely hampered because civilian emissions created by reuse of the base will have to be subtracted elsewhere in the air district in order to ensure there will be no net increase in overall emissions.²¹⁴

A second base closure problem associated with DOD's conformity determinations is the nature of the preliminary development plans obtained by military installations from

²¹² Swenson, *supra* note 9, at 333-34.

²¹³ *Id.* at 334.

²¹⁴ *Id.* This commentator noted that subtracting emissions elsewhere in the air district can be quite expensive in areas that do not have emission reduction credit (ERC) systems. In such areas, "base developers may need to locate compensating emission sources that can be shut down, pay for that shutdown, and apply for special concurrence by the air district's governing body that there will be no net increase in emissions." *Id.*

the local community at the start of the NEPA EIS process.²¹⁵ The community sometimes overstates its estimation of future air pollution and DOD relies upon the overstatement in making conformity determinations associated with base closure, necessitating a later revisiting of the conformity decision to ensure accuracy.²¹⁶ This is not the only manner in which NEPA and conformity interrelate, at least according to the First Circuit.

B. The Pease Air Force Base Lawsuit: Conservation Law Foundation, Inc. v. Department of the Air Force, et. al.²¹⁷

1. Background

Until the summer of 1994, federal facilities operated under the assumption that for federal projects, National Environmental Policy Act (NEPA)²¹⁸ procedural requirements

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Conservation Law Foundation, Inc. v. Department of the Air Force*, 864 F.Supp. 265 (D. New Hamp. 1995)[hereinafter CLF].

²¹⁸ National Environmental Policy Act 1969, Pub.L. No. 90-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§4321-47). A brief discussion of NEPA is appropriate to assist the reader in understanding the court's holding in this case. Enacted on January 1, 1970, NEPA was a watershed event in environmental law. As the first modern environmental statute, it was enacted to ensure that federal agencies consider the effect their decisions will have on the environment. *See Calvert Cliffs Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 449 F.2d 1109, 1113 (D.C. Cir. 1971). NEPA does not require an agency to come to a specific (or even an environmentally sound) decision. It does not impose substantive environmental obligations upon federal agencies. *See, e.g., Chelsea Neighborhood Ass'n v. United States Postal Service*, 516 F.2d 378, 384 (2d Cir. 1975) and *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). Insofar as federal agency compliance efforts are concerned, the most important provision of NEPA is certainly §102(2)(c), NEPA's "action-forcing" provision, which requires that a "detailed statement" known as an Environmental Impact Statement (EIS) be included in "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment. . ." 42 U.S.C. §4332(2)(C). An EIS must contain a detailed written statement concerning the environmental impact of the proposed action. *Id.* Two purposes underlie the responsibility to complete an EIS. First, it ensures the agency will put detailed information on environmental impacts before the decision maker when he or she decides what action to take. *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 349. Second, it ensures adequate public review and participation in the decision making process. *Id. See also Boston v. Volpe*, 464 F.2d 254, 257, (1st Cir. 1972). The NEPA process begins when the federal agency decides its proposal qualifies as a "major" federal action under the Act. The agency has three options -- it may prepare an environmental assessment (EA) to decide (1) whether an EIS must be done or (2) whether a Finding of No Significant Impact

and Clean Air Act §176(c) conformity requirements were, at best, distant cousins. Both had to be done, it was thought, but not necessarily in concert. A federal district court judge in the state of New Hampshire substantially changed that view in August 1994.

The 1988 Base Closure and Realignment Act²¹⁹ required the Secretary of Defense to close or realign all military installations recommended for such action by a twelve-person Commission on Base Realignment and Closure established by the Secretary of Defense in May 1988.²²⁰ The 1988 Act specifically exempted from the requirements of NEPA many of the actions of the Commission and the Secretary of Defense.²²¹ It provided, however, that NEPA would apply after the Secretary had made the decision to close or realign a particular military installation. The focus of NEPA analysis was limited

(FONSI) can be made; it may simply go ahead and prepare an EIS if the need for one is clear; or it may make a categorical exclusion (CATEX) determination if the proposed action will not individually or cumulatively have a significant effect on the human environment. Courts review federal agency EISs to determine whether they are "adequate" under NEPA. They conduct a "substantial inquiry" into the agency decision to decide whether the agency took the requisite "hard look" at the environmental issues. *See, e.g., Kleppe v. Sierra Club*, 427 U.S. 390 (1976), *Sierra Club v. United States Department of Transportation*, 753 F.2d 120 (D.C. Cir. 1985). The reviewing court is not empowered to substitute its judgment for that of the agency. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). So long as the agency has fulfilled its procedural duties under NEPA and has taken the requisite "hard look" at the potential environmental consequences of its proposed action, substantial deference is due the agency's decisions. *See, e.g., Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 97 (1983), *DiVosta Rentals, Inc. v. Lee*, 488 F.2d 674, 678 (5th Cir. 1973), *Grazing Field Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980). The agency is not required to "elevate environmental concerns over other appropriate requirements." *Strycker's Bay Neighborhood Council Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980). Only when there has been a "clear error of judgment" by the agency that deprives the agency's decision of a rational basis will a court overturn the decision. *National Wildlife Federation v. Marsh*, 568 F.Supp. 985, 999 (D.D.C. 1983).

²¹⁹ Pub.L. No. 100-526.

²²⁰ *Id.* at §§201(1), 201(2).

²²¹ *Id.* at §§204(c)(1)(A), 204(c)(1)(B). Exempted actions of the Commission included selecting bases for closure or realignment; recommending bases to receive functions from a military installation being closed or realigned; and making its report to the Secretary of Defense or the Congressional Committees. Exempted actions of the Secretary of Defense included setting up the Commission, deciding on the Commission's recommendations, selecting bases to receive functions from an installation being closed or realigned, or transmitting the report to the Congressional Committees. *Id.* In creating these exemptions, "[t]he conferees recognize[d] that the National Environmental Policy Act has been used in some cases to delay and ultimately frustrate base closures, and support the narrowing of its applicability for closures and realignments under this act." H.R. CONG. REP. No. 101-1071, 100th Cong., 2d Sess. 23 (1988), reprinted in 1988 U.S.C.C.A.N. 3395 at 3403.

to "the specific environmental impacts upon the gaining and losing locations, and the mitigating measures available to the Secretary."²²² A civil action seeking judicial review was required to be brought within 60 days of the date of the challenged action.²²³

In December 1988, the Commission on Base Realignment and Closure recommended to the Secretary of Defense that 86 military installations be closed and that 59 be partially closed or realigned.²²⁴ One of the bases recommended for closure was Pease AFB, near Portsmouth and Newington, New Hampshire. The Secretary accepted that recommendation on January 5, 1989.²²⁵ The recommended closures and realignments were allowed to begin between January 1990 and September 1991.²²⁶ Pease AFB was closed on March 31, 1991,²²⁷ and the Air Force began preparing an EIS to evaluate several proposals for the development and reuse of the base.²²⁸

The Air Force prepared a draft EIS in February 1991 and a final EIS in June 1991 analyzing the impacts of the transfer and redevelopment of the base.²²⁹ The final EIS evaluated the air quality impact of the transfer and redevelopment of Pease AFB and concluded that such activity would not result in the violation of the NAAQS or any state air quality standards. It attributed the region's existing ozone nonattainment status to the densely populated areas lying to the south of the base, but concluded that the proposed

²²² *Id.* at §§204(c)(2) and (c)(3); H.R.CONF.REP. No. 1071, 100th Cong., 2d Sess. 23 (1988), reprinted in 1988 U.S.C.C.A.N. 3395, 3403.

²²³ *Id.*

²²⁴ Memorandum of the Federal Defendants in Support of Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motions for Summary Judgment, Conservation Law Foundation, Inc. v. Department of the Air Force, No. C-92-156-L (U.S. Dist. Ct. NH 1994) at 1[hereinafter Federal Defendants].

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ CLF, *supra* note 217, at 265.

²²⁸ *Id.*

²²⁹ *Id.*

action would impact the state's ability to achieve the ozone precursor reductions required by the 1990 Clean Air Act Amendments.²³⁰ The Air Force issued an initial Record of Decision (ROD) in August 1991 and a supplemental ROD in April 1992.²³¹

The Conservation Law Foundation (CLF) in March 1992 filed a citizen's suit pursuant to Clean Air Act §304 challenging the actions of EPA and the United States Air Force in connection with the disposal and reuse of Pease AFB. Specifically, CLF alleged violations of NEPA and the Clean Air Act. The Pease Development Authority (PDA) -- a special purpose subdivision of the state of New Hampshire and the transferee of the Pease AFB property -- moved to intervene as a defendant in this case in April 1992.²³² The Town of Newington then filed a separate lawsuit against the Air Force, PDA, and EPA in June 1992,²³³ alleging violations of NEPA, the Clean Air Act, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).²³⁴ (The federal defendants will hereafter be collectively referred to as "the Air Force.") The cases were consolidated during the course of litigation.²³⁵

2. The CLF's arguments

Briefly stated, CLF alleged that the Air Force violated the Clean Air Act's conformity provision by:

- a. Supporting a project that failed to conform to the purpose of the New Hampshire SIP;
- b. Supporting a project that failed to conform to the purpose of the Maine SIP;

²³⁰ *Id.* at 270-71.

²³¹ *Id.* at 271.

²³² *Id.* at 272-73.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

c. Supporting a project that violated the purpose of the New Hampshire SIP through an increase in the severity and frequency of violations of the carbon monoxide standard;

d. Proposing mitigation measures that, in essence, would "exempt" the Air Force from compliance with the Clean Air Act and put the compliance burden on the state instead;

e. Conducting an inadequate air analysis to form the basis for the conformity determination; and

f. Having an inadequate basis for making a conformity determination.²³⁶

According to one commentator, the crux of CLF's argument was really that Clean Air Act §176(c) created a "substantive EIS."²³⁷ A normal NEPA EIS is procedural, in that it does not require a specific result -- it merely requires that the environmental impacts of a proposed action be communicated to the federal agency's decision maker.

Conversely, the conformity rule absolutely prohibits federal agencies from making decisions that adversely impact air pollution efforts. CLF believed the two had to work in tandem -- the agency could not make a procedural decision to go forward under NEPA without doing its substantive conformity determination first.²³⁸

3. The Air Force's and PDA's Arguments

With respect to the Clean Air Act claims in this case, the Air Force and PDA joined in defending against CLF's allegations.²³⁹ They argued that:

²³⁶ *Id.* at 275. CLF also maintained one conformity allegation against EPA, alleging it failed to make an independent conformity determination as required by 42 U.S.C. §7506(c)(1). The court granted summary judgment in favor of EPA on this count, noting that there was "ample evidence in the record to support [the] . . . contention that the EPA in fact did make conformity findings." *Id.* at 276.

²³⁷ Swenson, *supra* note 9, at 334.

²³⁸ *Id.*

²³⁹ See Memorandum of Defendant Pease Development Authority in Support of Motions for Summary Judgment and to Dismiss and in Opposition to Motions of Conservation Law Foundation, Inc. and Town of Newington for Summary Judgment (Clean Air Act Claims), Conservation Law Foundation, Inc. v.

(1) CLF's Clean Air Act claims against the Air Force should be dismissed in light of a prior ruling by the court²⁴⁰ and because the court lacked subject matter jurisdiction.²⁴¹

(2) The defendants were entitled to summary judgment on CLF's Clean Air Act claims. This assertion was subdivided into several individual arguments that:

(a) A conformity determination was not required with respect to Maine's SIP;

(b) The Air Force's approval of the Pease redevelopment fully complied with the conformity provision because:

(i) The Air Force conformity determination was not untimely;

(ii) The Air Force reasonably concluded that the project conformed to the purpose of the New Hampshire SIP;

(iii) The Air Force reasonably concluded that the project would not increase the frequency or severity of any existing violation of the ozone NAAQS for the relevant period;

(iv) The Air Force reasonably concluded that the project would not delay attainment of the interim emission reduction requirements or the ozone NAAQS;

(v) The Air Force reasonably concluded that the project would not cause or contribute to a new violation of the carbon monoxide NAAQS;

(c) EPA complied with the conformity provision.

Finally, the Air Force and PDA argued that because the administrative record left no genuine dispute as to any material fact and established that neither EPA nor the Air

Department of the Air Force, et al., Civil Action No. 1:92-CV-156-L (Consolidated) [hereinafter PDA Memorandum]. PDA unsuccessfully argued that the CLF's Clean Air Act claims against the Air Force should be dismissed because CLF failed to state a claim and the court lacked subject matter jurisdiction. PDA Memorandum at 4-9.

²⁴⁰ On April 4, 1994, the court ruled that CLF had failed to state a claim for relief against EPA under Clean Air Act §304(a)(1), because CLF failed to allege "a specific requirement or provision of either the New Hampshire or Maine [SIPs] which would be violated by the EPA's support of the project." *Id.* at 4-5.

²⁴¹ *Id.* at 4-9. On April 4, 1994, the court ruled that it did have subject matter jurisdiction over Clean Air Act claims against EPA under Clean Air Act §304(a)(2), which provides that a citizen suit may be filed against the Administrator of EPA "where there is alleged to be a failure of the Administrator to perform any nondiscretionary act or duty under the Act."

Force violated §176(c)(1) of the Clean Air Act, the court must grant summary judgment to the defendants on CLF's Clean Air Act claims.²⁴²

The Air Force's brief responded to CLF's NEPA and CERCLA allegations made by CLF, arguing:

(1) CLF was precluded from maintaining its NEPA action because Congress strictly limited judicial review or agency action in the base closure and realignment process.²⁴³

(2) The federal defendants fully complied with the requirements of NEPA.²⁴⁴

(3) Ministerial acts do not require NEPA compliance.²⁴⁵

(4) The Air Force's leasing of the base to the PDA fully complied with CERCLA §120(h).²⁴⁶

(5) CLF did not satisfy the prerequisites for obtaining the extraordinary relief of preliminary injunctive relief.²⁴⁷

4. The Decision

The court found that the procedures followed by the Air Force in issuing its conformity determination satisfied the procedural requirements of the Clean Air Act.²⁴⁸

On the substantive issues, the court found that the Air Force properly determined

²⁴² PDA Memorandum, *supra* note 239, at 4-38.

²⁴³ This argument concerns the 60-day limit on lawsuits challenging federal actions taken during closure or realignment. Draft Memorandum of the Federal Defendants in Support of Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motions for Summary Judgment, Conservation Law Foundation, Inc. v. Department of the Air Force, et al., Civil Action No. C-92-156-L (Consolidated) [hereinafter Federal Defendants' Draft Memorandum] at 47-55.

²⁴⁴ *Id.* at 55-81.

²⁴⁵ *Id.* at 81-88.

²⁴⁶ *Id.* at 88-94.

²⁴⁷ *Id.* at 94-98. In the First Circuit there are four prerequisites, according to the Air Force brief: (1) plaintiffs will suffer irreparable injury if the injunction is not granted; (2) such injury outweighs any harm which granting injunctive relief would inflict on the defendant; (3) plaintiff has exhibited a likelihood of success on the merits; and (4) the public interest will not be adversely affected by the granting of the injunction. See *Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981); see also *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *Associated Builders and Contractors, Inc. v. MWR*, 935 F.2d 345, 350 (1st Cir. 1991); *LeBeau v. Soirito*, 703 F.2d 639, 642 (1st Cir. 1983).

²⁴⁸ *Id.* at 22.

conformity with respect to the New Hampshire SIP and was not required to consider conformity with respect to Maine's SIP.²⁴⁹ The court also found that the timing of the conformity determination complied with Clean Air Act §176(c).²⁵⁰ Although it would seem from the court's decision on the Clean Air Act allegations that the Air Force "did everything right" with respect to conformity, the NEPA portion of the court's decision provided a surprise for the Air Force.

5. Integration of Conformity and the National Environmental Policy Act (NEPA)

The CLF complaint alleged the Air Force violated NEPA in that the final EIS's air quality analysis was inadequate in several respects. Specifically, it was alleged to be inadequate because:

- a. It failed to address the full scope of environmental costs and benefits relative to ozone precursor emissions;
- b. It violated NEPA's public disclosure requirements by failing to include a discussion of a July 30, 1991 carbon monoxide study;
- c. It failed to adequately address the ozone impact on the state of Maine; and
- d. It failed to adequately discuss air mitigation measures.²⁵¹

The CLF also claimed that the failure of the Air Force and EPA to circulate a Memorandum of Understanding (MOU)²⁵² -- entered into by the Air Force, EPA, the

²⁴⁹ *Id.* at 23, 30. CLF brought the Maine SIP into this case by arguing that prohibiting violations of "any standard in any area" meant that the Air Force was required to make conformity findings for any area affected by the Pease AFB project, including the state of Maine. At the time the Air Force was formulating its conformity determination, there were no EPA conformity regulations available for guidance. This left the Air Force with only the statutory language to guide it. PDA argued (and the court agreed) that the conformity provision does not define what is meant by "any standard in any area" and that the Air Force was correct in construing that language to apply solely to the SIP of the state in which the project was located, *i.e.*, New Hampshire. *Id.* at 19-20.

²⁵⁰ *Id.* at 30.

²⁵¹ *Id.* at 39-48.

state, and the PDA -- constituted a violation of the NEPA public disclosure requirements because the MOU contained discussion of issues which underlay the EIS decision.²⁵³ Finally, the CLF alleged the Air Force decision not to issue a supplemental EIS was unreasonable under the circumstances.²⁵⁴

The court began its NEPA analysis by deciding that the 1988 Base Closure and Realignment Act did not bar the CLF's NEPA claims as alleged by the Air Force. It held that the 60-day limit on NEPA judicial challenges to acts or omissions by the Secretary of Defense "was established to frustrate attempts to use NEPA as a means to delay base closures, not to prohibit challenges to environmental decisions made subsequent to the closure and realignment of a base."²⁵⁵ Thus, matters arising after the decision to close or realign and relating to the disposal or reuse of an installation are not subject to the 60-day limit. Since the CLF was not challenging the closure of the base but rather the development plans following the closure decision, the time limit was deemed inapplicable.

With respect to the CLF's other NEPA issues, the court noted that while it had found that the Air Force had satisfied the conformity provision of the Clean Air Act, the issue before it at this juncture was "whether that conformity determination satisfied the

²⁵² EPA, PDA and the New Hampshire Department of Environmental Services (NHDES) entered into an MOU (in which the Air Force subsequently entered) in August 1991. The MOU addressed EPA's air quality concerns by requiring a surface transportation study, a traffic model, a master transportation plan and a carbon monoxide analysis. The MOU required that the PDA not undertake further development beyond the level anticipated to generate 3.3 tons per day of hydrocarbon emissions until EPA approved a revised SIP for New Hampshire. EPA believed the MOU provided a framework within which the Pease AFB project could proceed in compliance with the Clean Air Act. *Id.* at 4.

²⁵³ *Id.* at 48.

²⁵⁴ *Id.* The Town of Newington additionally alleged that the discussion in the final EIS of the impact of the Pease Development on the surrounding wetlands was inadequate. *Id.* at 51. This issue, as well as the CERCLA aspect of the decision, is beyond the scope of this paper and will not be discussed further.

²⁵⁵ *Id.* at 37.

procedural requirements of NEPA.”²⁵⁶ The court held that in several respects it did not.

The court held that the Air Force violated NEPA by failing to prepare a supplemental EIS after conducting a conformity analysis and developing conformity information after issuing the final EIS. The court decided that “[t]he methods by which the [Air Force] chose to conform to the Clean Air Act should have been the subject of a [s]upplemental EIS.”²⁵⁷ This was so, it decided, because the CEQ’s NEPA regulations specifically provide for the issuance of a supplemental EIS “where significant new circumstances arise or new information becomes available,”²⁵⁸ and because NEPA’s public disclosure requirements mandate that an EIS must detail all relevant environmental information prior to a decision.²⁵⁹

The “new information” in this case was data concerning conformity. “The decisions made regarding the conformity of the project to the Clean Air Act amendments followed the EIS process and thus were never subject to the [sic] public comment,” noted the court.²⁶⁰ The Air Force had ultimately decided in finding that the Pease project conformed to the New Hampshire SIP that the project would not prevent the state from meeting mandated interim hydrocarbon emission reductions. During the EIS process, however, it appeared that the opposite was true.

CLF submitted comments to the draft EIS specifically addressing Clean Air Act compliance and asking the Air Force to address air quality issues in the final EIS.²⁶¹

²⁵⁶ *Id.* at 39. The court also held it was “obligated to consider the entire administrative record and not only the D[raft] EIS, F[inal] EIS and the accompanying documents.” *Id.*

²⁵⁷ *Id.* at 41.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 40.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 41. The Air Force asserted that in response to CLF’s comments it conducted further air quality analysis and included the information in the final EIS. *Id.*

Comments submitted by EPA to the draft and final EISs were "highly critical" of the Air Force's air quality analysis.²⁶² EPA did not believe the project would conform. Indeed, the Air Force's final EIS concluded that while the project was not expected to generate any NAAQS violations, the "proposed action will impact the [s]tate's plans to achieve federally mandated reductions of ozone precursor pollutant reductions" mandated by the 1990 Clean Air Act Amendments.²⁶³ In other words, the project did not conform.

Following the EIS process, the Air Force placated EPA's air quality concerns by entering into a Memorandum of Understanding (MOU) in August 1991 which contained mitigation measures -- including carbon monoxide monitoring and an assurance that hydrocarbon emissions would not exceed 3.3 tons per day -- designed to bring the Pease project into Clean Air Act compliance.²⁶⁴ Had it not been for the addition of the MOU's mitigation measures, it is doubtful the project -- as it stood -- would have conformed. EPA suggested the MOU be appended to the project's Record of Decision (ROD) to ensure the mitigation measures would be implemented. The Air Force agreed to do so, "thereby alleviating the Clean Air Act conformity concerns."²⁶⁵ The initial ROD was issued on August 20, 1991.²⁶⁶ EPA had noted in its August 14, 1991 comments to the final EIS, however, that while incorporating the MOU would resolve the Clean Air Act issues, it would not satisfy the Air Force's obligation under NEPA to disclose for public

²⁶² *Id.* at 39.

²⁶³ *Id.* at 40-41.

²⁶⁴ See *supra* note 251 and accompanying text.

²⁶⁵ CLF, *supra* note 217, at 284.

²⁶⁶ *Id.* at 271. A supplemental ROD was issued on April 13, 1992, to address issues regarding transfer of certain parcels of land. *Id.* at 277.

review in the EIS all "critical and relevant information on impacts and mitigation,"²⁶⁷ namely, the conformity determination information.

On March 20, 1992, the Air Force issued a Memorandum for the Record (MFR) to update the conformity determination in the ROD with newly obtained information -- a letter of assurance from the state governor and a "certification" from the New Hampshire Department of Environmental Services (NHDES) Commissioner attesting that the Pease project did indeed conform to the state SIP.²⁶⁸ The MFR "referred to the MOU as the basis of the conformity determination in the ROD," cited the MOU's requirements, and stated that those requirements would control emissions until the state issued a revised EPA-approved SIP.²⁶⁹

In sum, the final EIS's conclusion regarding air quality impacts (and hence, conformity) differed substantially from the information contained in the ROD and its appended MOU. The Air Force did not issue a supplemental EIS in connection with this changed information despite EPA's opinion that NEPA required it. This ill-timed and somewhat convoluted series of events led the court to conclude that NEPA had been violated as it was unreasonable for the Air Force to rely on information received subsequent to the preparation of the EIS in making a conformity determination and it was unreasonable for the Air Force to fail to include the new information it received subsequent to issuing the final EIS or in a supplemental EIS.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 272.

²⁶⁹ *Id.* The MFR also discussed the rationale for the Air Force's belief that the Pease redevelopment project would not violate either the existing or future SIPs. *Id.*

The court also found that the final EIS was inadequate in that it failed to address the air quality impacts of the project on the state of Maine. Despite finding that the Air Force was not required to consider air quality impacts upon states other than New Hampshire when making its conformity determination under Clean Air Act §176(c), the court decided that CEQ regulations describing the scope of an EIS required that the Air Force address such impacts on the state of Maine. Specifically, the court found that NEPA requires that acts significantly affecting the environment must be analyzed “in several contexts such as society as a whole (human, national), the affected region, and affected interests and the locality.”²⁷⁰ According to the court, the “affected region” for the Pease redevelopment project included the state of Maine:

The fact that the area affected by the Pease development extends beyond the boundaries of New Hampshire is not reason to ignore the air quality implications in the [final] EIS. Both the plain language of the statute and CEQ regulations mandate broader analysis than was contained in the [final] EIS.²⁷¹

The court also found the final EIS was inadequate in failing to analyze air quality mitigation measures related to the reuse and redevelopment of Pease AFB. The court agreed with CLF’s contention that while NEPA does not require the adoption of mitigation measures, it does require an adequate examination of various mitigation alternatives in the final EIS, whether or not such measures are ultimately adopted.²⁷² The Air Force had argued that (1) the final EIS was designed to address the environmental impact of the disposal of the base, (2) that most of the environmental effects would result from its ultimate reuse, not because of the transfer itself and (3) it was therefore sufficient

²⁷⁰ *Id.* at 286, citing 40 C.F.R. §1508.27(a).

²⁷¹ *Id.*

²⁷² *Id.* at 287.

that the final EIS merely identify the air quality mitigation measures and leave their implementation to future owners of the base property.²⁷³ The court disagreed with the Air Force's view that its role "as a transferor precludes further scrutiny of the project after its transfer."²⁷⁴ Instead, the Air Force should have addressed the environmental impact of development and reuse of the base.

The court based this finding, at least in part, on the holding in Conservation Law Foundation, Inc. v. General Services Administration.²⁷⁵ In that case, the First Circuit held that the environmental consequences surrounding the disposal of land by the General Services Administration (GSA) was a proper subject of an EIS, and the fact that the property was scheduled for transfer and redevelopment by a non-federal party did not relieve the GSA of responsibility under NEPA. Just as in the GSA case, said the court, the Air Force was not relieved of the responsibility for addressing the environmental impacts of post-transfer development and reuse. As such, its final EIS inadequately dealt with this issue by failing to analyze the various mitigation measures relative to the base's development and reuse.²⁷⁶

6. The Appeal

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ 707 F.2d 626, 633 (1st Cir. 1983).

²⁷⁶ CLF, *supra* note 217, at 289. To give effect to its NEPA ruling, the court ordered the Air Force to augment its June 1991 final EIS to provide (1) additional analysis of how redevelopment will affect wetlands on and around the base and air quality in Maine, and of measures that could be taken to mitigate environmental impacts, and (2) notice to the public of post-final EIS developments, including the August 1991 MOU limiting air emissions from Pease redevelopment and the decision to give PDA immediate access to portions of the base under a long term lease and contract of conveyance. This information was to be made public in a supplemental EIS to be completed by August 29, 1995. The court refused to enter a broader injunction stopping PDA's redevelopment activity, holding that it was "not convinced under the circumstances that the plaintiffs [had] demonstrated the irreparable harm necessary for granting a preliminary injunction."

In the spring of 1995, CLF and the Town of Newington appealed portions of the district court's August 1994 decision in Conservation Law Foundation, Inc. v.

Department of the Air Force, et.al. They asked the court of appeals to do the following:

- a. Order injunctive relief, including nullification of prior federal approvals and leases and prohibition of future land transfers and development until a "lawful" supplemental EIS is completed;
- b. Order new federal approvals and conformity determinations informed by a lawful environmental analysis and in compliance with the Clean Air Act and applicable EPA conformity regulations;
- c. Require the Air Force and the Federal Aviation Administration (FAA) to prepare an adequate supplemental EIS;²⁷⁷
- d. Hold that the Air Force and the FAA violated NEPA by issuing Pease approvals based upon an adequate EIS.²⁷⁸

CLF and the Town of Newington asked for sweeping injunctive relief which would both nullify decisions made by the Air Force and the FAA in 1991-92 concerning the reuse of land on Pease AFB and oust the PDA and its sublessees from portions of the base that PDA began leasing from the Air Force in April 1992.²⁷⁹

The government did not appeal the NEPA or Clean Air Act portions of the district court's decision.²⁸⁰ In its response to the CLF appeal, the government sought primarily to preserve the denial of injunctive relief in favor of CLF and to ensure upholding of the

²⁷⁷ This is an odd and seemingly unnecessary allegation, in that the Air Force was already preparing a supplemental EIS in compliance with the district court's order.

²⁷⁸ Original Brief for Petitioner-Appellant Conservation Law Foundation, Inc. at 17-48, March 15, 1995.

²⁷⁹ Response Brief for Federal Appellees-Respondents/Cross-Appellants at 1, May 1995 [hereinafter Government Response Brief]. CLF and the Town of Newington also asserts that the district court abused its discretion when it declined to impose an injunction halting future transfers and redevelopment efforts at Pease after finding that the Air Force had violated CERCLA §120(h)(3) and NEPA §102(2)(C). They also contend that the Air Force and EPA violated Clean Air Act §176(c)(1), and that the FAA did so as well when it approved the PDA's plan for establishment of a civilian airport on the former base. *Id.* at 1-2.

²⁸⁰ Opening Brief for the Federal Appellees-Respondents/Cross-appellants at 3, March 1995.

district court's finding that the Air Force complied with the Clean Air Act's conformity provision.²⁸¹ It is particularly important to the Air Force that the Clean Air Act portion of the district court's decision be upheld. This is so because it is the first -- and to date, the only -- judicial finding that the Air Force is correctly implementing Clean Air Act §176(c). Such a holding could become critical to the Air Force's general conformity compliance program if recent challenges to EPA's general conformity regulation, discussed in the next section of this thesis, are successful, because it would serve as a justifiable basis for continuing to do conformity determinations in the same manner as at Pease.

Oral arguments on this appeal were heard during the early summer of 1995. The U.S. Court of Appeals for the First Circuit had not decided the case as of early August 1995.

²⁸¹ Government Response Brief, *supra* note 279, at 24-46. The CERCLA portions of the government's response to this appeal will not be discussed herein.

CHAPTER VI. THE FUTURE OF CONFORMITY

A. Litigation Challenging the General Conformity Rule

The enactment of complex environmental laws frequently brings litigation as the regulated community seeks to limit or, at a minimum, more clearly define the scope of its new responsibilities. Conformity has been no different in this regard, even though its regulated community, the federal government, is somewhat smaller than those who are typically affected by changes in air pollution control laws. Two recent lawsuits brought by environmental groups against EPA seek to broaden the scope of general conformity applicability by adding the conformity requirement to attainment and PSD areas and eliminating the various exemptions EPA included in the final general conformity regulation.

B. Environmental Defense Fund v. Browner: Conformity Requirements for Attainment and PSD Areas?

In the EPA General Conformity Final Rule, EPA interpreted the conformity requirement as being mandatory only for nonattainment areas, although it noted that "EPA continues to believe that the statute is ambiguous and that it provides EPA discretionary authority to apply these general conformity procedures to both attainment and nonattainment areas."²⁸² The Environmental Defense Fund (EDF) and the Sierra Club, among others, disagreed with EPA on this point and brought a citizen suit against the agency in the Federal District Court for the Northern District of California.²⁸³

²⁸² Final Rule, *supra* note 31, at 63214.

²⁸³ EDF v. Browner, No. C-92-1636, 1995 U.S. Dist. LEXIS 2616 (D.C. N. Calif. Feb. 10, 1995).

The plaintiffs sought to compel EPA to promulgate conformity regulations for attainment and unclassifiable areas -- areas not covered by the General Conformity Rule.²⁸⁴ According to the plaintiffs, the language of §176(c)(1) “unambiguously means that attainment areas should be subject to conformity analysis.”²⁸⁵ This is so, they argued to the court, because §176(c)(1)(B)(i) defines conforming activities as those which will not “cause or contribute to any new violation of any standard in any area.”²⁸⁶ The plain reading of “in any area” must necessarily include attainment and unclassifiable areas, according to the plaintiffs. Moreover, a “new violation,” by definition, can only refer to a violation of NAAQS in an area designated as being *in attainment* for a particular pollutant.²⁸⁷ This must be the case, the plaintiffs argued, because “[i]f an area is already designated nonattainment for any one pollutant, a worsening of pollutant levels would not constitute a ‘new’ violation.”²⁸⁸

EPA argued that the meaning of §176(c) is ambiguous because of its placement within Subpart 1, “Nonattainment Areas in General” of Part D, “Plan Requirements for Nonattainment Areas,” rather than within Part C, “Prevention of Deterioration of Air Quality,” of the Clean Air Act.²⁸⁹ EPA argued that because of the ambiguity involved, the court should look to a series of cases decided by the Supreme Court which “recognized

²⁸⁴ *Id.* at 2. The suit was brought pursuant to 42 U.S.C. §7604(a)(2).

²⁸⁵ *Id.* at 7.

²⁸⁶ *Id.*, citing 42 U.S.C. §7506(c)(1)(B)(i) (Emphasis added).

²⁸⁷ *Id.* at 7-8.

²⁸⁸ *Id.* at 8. Indeed, “to cause a location or region to exceed a standard more often or to cause a violation at a greater concentration that previously existed and/or would otherwise exist during the future period in question” is explicitly defined as increasing the “frequency or severity” of a violation in the Final Rule, noted the court. *Id.*

²⁸⁹ *Id.* at 10.

that titles can be useful aids in resolving ambiguity and discerning congressional intent.”²⁹⁰ Additionally, said EPA, other portions of §176 refer specifically to nonattainment areas, and therefore illustrate the range of the entire section.²⁹¹ In other words, where Congress meant to include nonattainment and/or unclassifiable areas, it did so specifically, according to EPA.

Judge Thelton E. Henderson of the U.S. District Court for the Northern District of California sided with the plaintiffs. “In this case, the language of §176(c) plainly embraces all geographic areas, including attainment and unclassifiable areas, as well as nonattainment and maintenance areas,” held the court.²⁹² The court believed that the legislative history behind §176(c) “suggests that all areas should be subject to conformity analysis.”²⁹³ He also held that Congress, in effect, ratified an earlier EPA interpretation of §176(c) -- in which the conformity requirement applied everywhere there was a SIP -- by

²⁹⁰ *Id.* at 11, citing *Mead Corporation v. Tilley*, 490 U.S. 714, 723 (1989), which in turn cited *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385-388-89 (1959).

²⁹¹ *Id.* at 9. EPA cited to 42 U.S.C. §§7506(c)(2)(D), (c)(3)(A)(iii), and (c)(3)(B)(iii) in support of this argument.

²⁹² *EDF v. Browner*, 1995 U.S. LEXIS 2616 at *26.

²⁹³ *Id.* The legislative history to which the court refers is a congressional reference to a 1975 EPA policy statement contained in its “Guidelines for Analysis of Consistency Between Transportation and Air Quality Plans and Programs” (hereinafter Guidelines). The Guidelines were issued jointly by EPA with the FHWA to help carry out the requirement of §109(j) of the Federal Aid Highway Act, 23 U.S.C. §109(j), that highways be “consistent with any state implementation plan. The Guidelines required “consistency” even for areas with no NAAQS violations. In congressional debate about the 1990 Clean Air Act amendments, Senator Baucus, the sponsor and manager of the Senate bill that became the basis of the 1990 conformity amendments and the chair of the subcommittee that reported the bill, explained his understanding of the 1977 amendments to the Senate. He commented that the “intent of the ‘conformity’ provision added to the Clean Air Act in 1977 was to give clear legislative authority for the application of air quality criteria to the review and approval of transportation plans and well as projects in accordance with the DOT/EPA joint 1975 guidance.” 135 CONG. REC. S 16972, col. 2 (daily ed. October 27, 1990). Judge Henderson indicated in his decision that this language in the legislative history shows that “Congress acknowledged it drew on the Guidelines -- which required consistency even for areas with no NAAQS violations -- in crafting section (c)(1)(B)’s conformity tests. It is especially telling that Congress chose to follow the language of the Guidelines’ consistency criteria so closely,” the court noted. *Id.* at 21.

reenacting that provision without change.²⁹⁴ The judge therefore ordered EPA to promulgate final regulations containing criteria and procedures by which the conformity of federally supported activities other than transportation plans, programs and projects will be determined in every area subject to an implementation plan that is not covered by the final General Conformity Rule published on November 30, 1993.²⁹⁵

C. Environmental Defense Fund, Inc. v. U.S. EPA: Challenging the Underpinnings of the General Conformity Rule

In January 1994, the EDF, the Sierra Club, the Natural Resources Defense Council, Inc. (NRDC), the CLF, the Oregon Environmental Council, the Delaware Valley Citizen's Council for Clean Air, the Institute for Transportation and the Environment, and the South Coast Air Quality Management District filed citizen suits in the District of Columbia Court of Appeals against EPA and its Administrator, Carol Browner, and DOT

²⁹⁴ *Id.* at 26. The judge apparently agreed with the plaintiffs that EPA had originally interpreted the conformity requirement as being applicable in attainment areas. He noted that the initial EPA statement of policy applying the conformity requirement to attainment areas came in the form of the 1975 Guidelines (*see supra* note 287), and that EPA reiterated this position in a 1988 letter to the Administrator of the FHWA, saying that if plans or projects "cause or contribute to existing or new standard violations, or delay attainment, they should not be found in conformity. EPA's definition of conformity is basically the same definition as that contained in the Consistency Guidelines of 1975. . . ." *Id.* at 22. Additionally, the court noted that in 1980, EPA had issued an advance notice of proposed rulemaking, published at 45 Fed. Reg. 21590 (April 1, 1980), in which EPA "flatly asserts that 'EPA believes that the Congressional intent of §176(c) was that federal actions should not be allowed to cause delay in the attainment of maintenance of the NAAQS in any state or violation of PSD requirements in areas with air cleaner than the NAAQS.'" *Id.* at 23. Since the court decided it was clear that "Congress was aware of the Guidelines when it developed the conformity criteria of §176(c)," but did not change the language significantly when transforming the Guidelines into the §176(c) conformity requirement, it held that Congress essentially ratified EPA's original definition. This is so, the court held, because where "an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter the interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned," (citing *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 556 n.20 (1979)). *Id.* at 18-25.

²⁹⁵ *Id.* at 29-30. The judge gave EPA 270 days from the date of his order (until November 1995) to promulgate the new regulation, and reminded EPA to give the public 60 days to comment on the proposed new regulation. *Id.*

and its Secretary, Frederico Pena, challenging the Transportation Conformity Rule and the General Conformity Rule promulgated by EPA under Clean Air Act §176(c).²⁹⁶

The environmental petitioners (hereinafter collectively referred to as "EDF") alleged EPA acted unlawfully, or arbitrarily and capriciously, in:

1. Substituting compliance with NEPA for compliance with the substantive air quality requirements of Clean Air Act §176(c).
2. Allowing approvals to be granted to actions that fail to conform to the SIP, simply because they used to conform at some earlier time.
3. Prohibiting pollution-reducing transportation control measures whose implementation is required by the Clean Air Act, while allowing implementation of pollution-neutral projects whose implementation is optional.
4. Allowing approval of transportation plans and programs that provide for implementation of transportation control measures (TCMs) on schedules that violate the implementation deadlines set forth in the SIP.
5. Failing to provide for timely implementation of TCMs that are not federally fundable.
6. Failing to require transportation plans and programs to contribute to emission reductions during the interim period.
7. Exempting nitrogen oxides from the transportation conformity rule.
8. Exempting statewide transportation plans and programs from conformity requirements.
9. Exempting the emissions associated with non-highway and non-transit projects from the emissions analysis conducted for transportation programs and projects.

²⁹⁶ Joint Brief of Environmental Petitioners, Environmental Defense Fund, Inc. et al. v. United States Environmental Protection Agency, et al., No. 92-1003 and consolidated cases 94-1047, 94-1062, U.S. Ct. of App. (D.C. Cir.), February 27, 1995 at 1 [hereinafter EDF Joint Brief], and the Brief of Government Respondents, Environmental Defense Fund, Inc., et al. v. United States Environmental Protection Agency, et al., No. 94-1044 and consolidated cases, U.S. Ct. of App. (D.C. Cir. 1995) at i [hereinafter EPA Brief]. During the early stages of the case, the American Trucking Association and the American Road and Transportation Builders Association joined in these suits as intervenors. EPA Brief at i.

10. Exempting non-highway and non-transit projects such as air, water and rail from conformity requirements.
11. Allowing federal agencies to grant approvals they know will foreseeably cause new pollution violations and prolong existing one, under the pretext that the agency has no "continuing program responsibility" over the violations.
12. Exempting certain actions from the General Conformity Rule on *de minimis* grounds, even though no such exemption is authorized by the Clean Air Act and even though EPA has failed to demonstrate that the impact on air quality of the exempted actions -- either individually or cumulatively -- is trivial.
13. Allowing agencies to approve actions that fail to conform to the SIP under the pretext that the state has promised to revise the plan.²⁹⁷

The general conformity issues raised by EDF can be broken down into discrete areas -- (1) the definition of when (and if) conformity determinations must be made under the new rule, (2) exemptions for *de minimis* levels of pollution and "presumed to conform" categories, (3) federal approval of actions with emissions over which the agency will have no "continuing program responsibility," and (4) approval of actions that fail to conform solely because a state has agreed to revise the SIP in the future to achieve conformity. They will be discussed in turn.

1. Defining When Conformity Determinations Should be Made under the New Rule

a. EDF's Arguments

EDF objects to the grandfathering provisions of the General Conformity Rule, as well as to EPA's decision on the timing of conformity determinations.

(1) "Grandfather" Provisions

²⁹⁷ *Id.* at 1-2. Clearly, a number of EDF's allegations involve transportation conformity rather than general conformity. This thesis will discuss the arguments relating only to general conformity issues.

The transitional or "grandfather" provisions to which EDF objects are those that allow approvals of actions where NEPA documentation was completed by January 31, 1994. EDF alleges this grandfathering "allow[s] past agency derelictions to be further prolonged, and compliance with Congress's mandates to be postponed yet again."²⁹⁸ EDF argues that Clean Air Act §176(c) expressly mandates comprehensive coverage of all federal actions, and that "EPA is not free to narrow that coverage by administrative fiat."²⁹⁹ This is especially true, says EDF, where Congress explicitly "built a limited grandfather exemption into §176(c)(3)(B)(i)³⁰⁰ for certain transportation projects. EPA may not supplement that statutory exemption with others of its own making."³⁰¹

EDF also suggests that the grandfather provisions violate NEPA §104, which provides that "[n]othing in §§4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency. . . to comply with criteria or standards of

²⁹⁸ EDF Joint Brief, *supra* note 296, at 16.

²⁹⁹ *Id.* at 17. In making this argument, EDF cited a number of cases it believes supports the theory that EPA cannot carve out certain exemptions to a statute where no statutory language exists to permit it. For example, in *Hercules Inc. v. U.S. Environmental Protection Agency*, 938 F.2d 276, 280 (D.C. Cir. 1991) a governing statute required federal agencies selling real property to notify the purchaser if hazardous waste had been stored on the property. In that case, the court held that EPA erred by limiting the notification obligation to situations where the hazardous waste was stored during the time the property was owned by the United States. The court stated, "We reject the EPA's action because it reads into the statute a drastic limitation that nowhere appears in the words Congress chose and that, in fact, directly contradicts the unrestricted character of those words." *Id.* In *Sierra Club v. U.S. Environmental Protection Agency*, 992 F.2d 337, 343-45 (D.C. Cir. 1993), a statute required groundwater monitoring by facilities potentially receiving certain enumerated wastes. The court determined that EPA acted improperly when it required monitoring only at larger facilities receiving such wastes. It held: "Nothing in the statute diminishes or qualifies the generality of these two key words -- *equipment* and *facility*. Nothing in the statute states that only certain kinds of equipment of facilities need to be regulated." *Id.*

³⁰⁰ Clean Air Act §176(c)(3)(B)(i) states that until a SIP revision is approved, conformity of transportation plans, programs and projects will be demonstrated if transportation projects "come from a conforming transportation plan as defined in [§176(c)(3)(A)] or for 12 months after November 15, 1990, from a transportation program found to conform within three years prior to November 15, 1990. . ."

³⁰¹ EDF Joint Brief, *supra* note 296, at 18. EDF cites as support *Sierra Club v. U.S. Environmental Protection Agency*, 719 F.2d 436, 453 (D.C. Cir. 1983), in which the court held "where a statute lists several specific exceptions to the general purpose, others should not be implied."

environmental quality.”³⁰² According to EDF, “[i]t would be difficult to imagine a clearer transgression of this language than [40 C.F.R.] §51.850(c)(1), which grants an exemption from [statutory] conformity requirements based solely on compliance with NEPA §102 (*i.e.*, 42 U.S.C. §4332).”³⁰³

EDF also argues that where federal support of actions had not yet occurred as of the promulgation date of the General Conformity Rule, such actions would have to meet the new rule rather than the old standard -- even where NEPA analysis had already been completed. Hence, no project can be caught in “mid-stream” and no retroactivity problem exists.³⁰⁴

(2) Timing of Conformity Determinations

Further to bolster its contentions, EDF argues that the use of the present tense language in §176(c) (*i.e.*, prohibiting any federal action that “does not” conform) means that conformity status cannot be determined until the federal action actually occurs.³⁰⁵ In

³⁰² 42 U.S.C. §4334.

³⁰³ EDF Joint Brief, *supra* note 296, at 18.

³⁰⁴ EDF argues that EPA’s rationale for including the grandfather provision (*i.e.*, that to do otherwise would unfairly cause some projects which had complied with the law to halt in mid-stream upon adoption of the General Conformity Rule) is “fallacious.” EDF asserts that the four-part test upon which the grandfather exemption was based was unnecessary because no retroactivity problem exists with conformity situations. The four-part test as enumerated by EPA in the Final Rule was: (1) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law; (2) the extent to which the party against whom the new rule is applied relied on the former rule; (3) the degree of burden which immediate application of a rule imposes on a party, and (4) the statutory interest in applying a new rule despite the reliance of a party on the old standard. 58 Fed. Reg. at 63216.

EDF claims that there should be no retroactivity problem because the operative actions for purposes of §176(c)(1) occur when an agency engages in, supports in any way, provides assistance for, licenses or permits, or approves an activity.

³⁰⁵ *Id.* at 20. According to EDF, “the statute is crystal-clear about the point in time at which conformity must exist: it must exist. . . on the date when the agency ‘engage[s] in, support[s], in any way or provide[s] financial assistance for, license[s] and permit[s], or approve[s]’ the activity. . . .” *Id.*

EDF's view, this should preclude the legal ability of any federal action to conform until the final federal step is taken.

b. EPA's Response

(1) "Grandfather" Provisions

In its responding brief, DOJ counters EDF's allegation in a number of ways. First, EPA alleges that, regarding NEPA, EDF "has confused two distinct issues: (1) whether the federal action must comply with the statutory requirement of conformity and (2) whether compliance must be assessed in terms of the particular criteria and procedures established by this new regulation."³⁰⁶ EPA notes that 40 C.F.R. §51.850(c)(1) must be read together with §51.850(b). Read in concert, they state:

(b) A Federal agency must make a determination that a Federal action conforms to the applicable implementation plan in accordance with the requirements of this subpart before the action is taken.

(c) Paragraph (b) of this section does not include Federal actions where either:

(1) A [NEPA] analysis was completed as evidenced by a final [EA], a final [EIS] or a finding of no significant impact (FONSI) that was prepared prior to January 31, 1994. . . .³⁰⁷

The regulation, argues the government, establishes completion of the NEPA process as the factor for determining whether the newly-promulgated conformity procedures and requirements, as opposed to the prior legal standards, should be used to assess conformity, argues EPA.³⁰⁸ When the conformity rule was promulgated, "it was inevitable that . . . many projects dependent on federal actions were well underway or even nearing completion. Some of these projects might not prove viable under the new criteria,

³⁰⁶ EPA Brief, *supra* note 296, at 18.

³⁰⁷ 40 C.F.R. §51.850(b) and (c)(1).

³⁰⁸ EPA Brief, *supra* note 296, at 18.

even though they satisfied the prior [conformity] standards.”³⁰⁹ Therefore, EPA decided that a transition or “grandfathering” provision -- promulgated as §51.850(c) -- was needed because the General Conformity Rule was an “abrupt departure” from prior practice.³¹⁰

Because the pre-1990 Clean Air Act did not define or really explain conformity, the government argues that federal agencies were accustomed to evaluating conformity in the context of NEPA, and relied on there being no specific procedural requirements beyond NEPA.³¹¹ The General Conformity Rule established a “very structured process that goes far beyond the analysis done in conjunction with NEPA,” argues EPA.³¹² Forcing ongoing projects to meet the new rule’s substantive conformity requirements would create uncertainty that could not have been anticipated beforehand. Such uncertainty “could threaten the viability of projects where considerable resources already have been invested.”³¹³

If the General Conformity Rule were applied as EDF suggests, asserts EPA, it “would automatically invalidate all analysis conducted under previous legal standards.”³¹⁴ The EDF argument that retroactivity is not an issue is “implausible” because the “status of federal actions or projects dependent on federal approval could be changed from conforming to nonconforming simply by promulgation of the rule.”³¹⁵

³⁰⁹ *Id.* at 19.

³¹⁰ *Id.* at 22. EPA noted in its brief that although Clean Air Act §176 was established by the 1977 Clean Air Act amendments, it did not call for EPA or any other agency to adopt regulations to implement the conformity requirement. Additionally, the only specific non-transportation conformity regulation existing at that time, 40 C.F.R. §6.303, applied only to EPA actions, not to those of other federal agencies. *Id.*

³¹¹ *Id.* at 22, citing 58 Fed.Reg. at 63216.

³¹² *Id.* at 22.

³¹³ *Id.*

³¹⁴ *Id.* at 25.

³¹⁵ *Id.* EPA disagrees with EDF’s contention that concerns about retroactivity are not implicated unless the entire transaction is completely in the past. Such a view, the Agency asserts, is contrary to the court’s decision in *NRDC v. Thomas*, 838 F.2d 1224 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 901 (1988), where

(2) Timing of Conformity Determinations

EPA responds to EDF's "verb tense" argument by asserting that the EDF's proposed statutory construction:

would produce an absurd result. EDF would leave all conformity determinations -- whether done under previous standards or the conformity rules at issue here -- open to constant reevaluation. . . If the standard for conformity, the SIP, or any factor relative to a conformity determination changed, the project could not receive the next approval unless it was modified so as to conform under the new facts. For a complicated project, this process would be repeated numerous times. Even after years of progress, a project could suddenly be shut down because of a change in the conformity standard shortly before completion, thereby wasting the resources invested.³¹⁶

EPA noted that the suggestion that Congress intended to create such a scenario was rejected by the First Circuit in Conservation Law Foundation v. Federal Highway Administration, a case which held that the 1990 Clean Air Act amendments did not invalidate preexisting project conformity determinations by requiring new ones.³¹⁷

According to the First Circuit, CLF's position would have resulted in "a complete halt of all ongoing projects regardless of how close to completion those projects have become.

We see no evidence in the Clean Air Act that Congress intended such a result."³¹⁸

NRDC challenged EPA's decision to exempt certain facilities that had increased facilities' stack height from the requirement that they demonstrate that the increase was necessary to avoid specific adverse consequences, in order to receive emissions limitation credits. The court held that retroactivity was involved in the case "simply because enforcement of the demonstration requirement might impinge unfairly on source owners that made investments or other commitments in reasonable reliance on prior understandings . . . Clearly the issue entails a balancing of the interest in prompt and complete fulfillment of statutory goals against the inequity of enforcing a new rule against persons that justifiably made investment decisions in reliance on a past rule or practice." *Id.* at 1244.

³¹⁶ EPA Brief, *supra* note 296 at 31.

³¹⁷ *Conservation Law Foundation v. FHWA*, 24 F.3d 1465 (1st Cir. 1994). The case dealt with a project in which a highway was being constructed across the island of Jamestown, Rhode Island, to connect two bridges. Final federal environmental approval to proceed was given in 1988; the state acquired the necessary land by 1990; and the final FHWA approval and permit from the Army Corps of Engineers were issued in 1992. *Id.* at 1467, 1480 n.9.

³¹⁸ *Id.* at 1480. For its part, EDF dismisses the First Circuit's decision in the CLF case because it "ignores the plain language of the Act." EDF Joint Brief, *supra* note 296, at 22.

EPA also argues EDF has incorrectly characterized the timing portion of the conformity regulations as creating “exemptions” from the statutory requirement to conform.³¹⁹ Rather, EPA asserts, the provision merely establishes a “grace period” for projects that had not had a conformity determination at the time the 1990 amendments were enacted. “It does not establish an exemption for the requirement of conformity, but instead defines the standard that will be used for assessing conformity.”³²⁰

2. Validity of the *De Minimis* Exemptions to the General Conformity Rule

a. EDF's Arguments

EDF also challenged the General Conformity Rule's *de minimis* thresholds and its EPA-specified categories of activities that are presumed to conform. EDF argues that carving out these exemptions violates the Clean Air Act because it allows some activities to proceed “no matter how large emissions from each individual action may actually be, or how many such actions may occur in a given polluted area.”³²¹ Just as individual components of the same action can combine to produce air quality standards, EDF argues, air quality impacts of many small actions can do so as well. “. . . [T]he public's lungs,” they state, “will not care whether the pollution emanates from many small sources or a few big ones.”³²²

EDF calls EPA's decision to create these exemptions an impermissible interpreting of general conformity by applying it to “major sources” only. Congress, EDF argues,

³¹⁹ *Id.* at 33-34.

³²⁰ *Id.*

³²¹ EDF Joint Brief, *supra* note 296, at 60.

³²² *Id.* at 62.

knew exactly how to limit the applicability of a Clean Air Act requirement to "major sources" if it wished to do so, and it did not in §176(c)(1).³²³

b. EPA's Response

The purpose of §176(c), says EPA, is to make certain that activities of the federal government do not prevent attainment of the NAAQS by failing to conform to the applicable SIP. This purpose can be achieved without applying the General Conformity Rule's burdensome procedural requirements to activities that involve little or no emissions of air pollutants.³²⁴ Prohibiting *de minimis* exemptions would violate the principle of statutory construction that provisions are construed to avoid absurd results, says EPA -- and it would be absurd to require conformity determinations for activities it believes are obviously not harmful to air quality, such as advisory and consultative activities such as legal counseling, or granting deposit or account insurance to banking customers.³²⁵

EPA asserts that the authority to establish *de minimis* exceptions is part of the Agency's usual responsibility in carrying out a statutory scheme.³²⁶ The *de minimis* doctrine is a means of interpreting the statutory language, not judicially or administratively

³²³ *Id.* at 59-60, citing Clean Air Act §172(c)(5), in which SIPs in nonattainment areas must require permits for "major stationary sources."

³²⁴ EPA Brief, *supra* note 296, at 69. "The statutory language and legislative history [of §176(c)] disclose that Congress paid extremely little attention to the matter of conformity of non-transportation federal actions. It is inconceivable that Congress intended to require agencies to expend the enormous resources that would be necessary to make individualized conformity determinations for all federal actions -- without exception -- given that the statutory language and legislative history fail to reflect that such a requirement was even debated." *Id.* at 74.

³²⁵ *Id.* at 73-74.

³²⁶ *Id.* at 70. It cites case law to support the argument that there is "virtually a presumption in its favor," *Public Citizen v. Young*, 831 F.2d 1108, 1112 (D.C.Cir. 1987), and that *de minimis* exceptions should be inferred "save in the face of the most unambiguous demonstration of congressional intent to foreclose them." *Alabama Power Co. v. Costle*, 636 F.2d 332, 357 (D.C. Cir. 1979). EPA also cites to *Pacific Gas & Electric Co. v. FERC*, 720 F.2d 78, 89-90 (D.C. Cir. 1983): "most. . . statutory provisions. . . must incorporate some common sense limits."

amending it, EPA adds.³²⁷ Finally, EPA argues that the EDF's challenge to its *de minimis* exemption fails under the familiar two-prong test of Chevron U.S.A., Inc. v. Natural Resources Defense Council,³²⁸ because the scope of federal actions subject to conformity procedures under §176(c) is ambiguous, and EPA's *de minimis* exemption is reasonable.³²⁹

With respect to the creation of tonnage thresholds, EPA argues that they were the most reasonable choice EPA could make in order to avoid the absurd result of requiring conformity determinations for every federal action, no matter how inconsequential.³³⁰

3. Lack of "Continuing Program Responsibility" over Emissions

a. EDF's Arguments

EDF did not contest the first portion of the §51.852 definition of "indirect emissions" -- i.e., that the General Conformity Rule covers emissions that "[a]re caused by the Federal action, but may occur later in time and/or may be farther removed in distance from the action itself but are still reasonably foreseeable."³³¹ EDF did challenge the remainder of that definition -- exempting emissions from conformity review unless the federal agency can "practicably control" them and will maintain control over them due to a "continuing program responsibility" of the federal agency. To EDF this is another "impermissible" rewriting of the broad language of §176(c)(1).³³²

³²⁷ EDF Joint Brief, *supra* note 296, at 70.

³²⁸ 467 U.S. 837 (1984). The Chevron test requires the court to decide whether Congress has directly spoken to the precise question at issue, and, if the statute is silent or ambiguous, to decide whether the agency's interpretation is based on a permissible construction of the statute. *Id.* at 842-44.

³²⁹ EPA Brief, *supra* note 296, at 70-71.

³³⁰ *Id.* at 82.

³³¹ EDF Joint Brief, *supra* note 296, at 52.

³³² *Id.* Indeed, says EDF, the "stark inconsistency between the plain language of §176(c)(1) and EPA's rule fully suffices to require reversal. . ." *Id.* at 53. EDF points to two other provisions of the Clean Air Act as "additional confirmation" that the exemption included by EPA in the definition of "indirect

b. EPA's Response

In deciding how to define "indirect emissions," EPA concluded that "if the federal agency has no continuing program responsibility for a project, then under the agency's authorizing statute, it has no means of controlling future emissions associated with the project and no means of enforcing any required mitigation measures."³³³ Including mitigation measures in SIPs, EPA argued, "would disrupt the balance between state and federal agencies with respect to air quality established by the [Clean Air Act]."³³⁴

4. Validity of Positive Conformity Determinations Based on a State's Enforceable Commitment to Revise its SIP

a. EDF's Arguments

emissions" shouldn't be there. First, says EDF, in §176(c)(2)(A), Congress directed that transportation conformity determinations must include within their scope not just emissions from constructing a highway, but also emissions from motor vehicles using the highway. "Congress mandated this result even though USDOT has no 'continuing program responsibility' over how many cars are allowed to use the highway." *Id.* Second, EDF argues that Clean Air Act §316, which governs air pollution requirements in connection with EPA grants for construction of sewage treatment plants, requires consideration of the emissions foreseeably resulting from the commercial and residential development of additional sewage treatment capacity, not just from construction of the plant itself, as part of the conformity review. *Id.* at 54. *See* Clean Air Act §316(b)(3), 42 U.S.C. §7616(b)(3). These two provisions, according to EDF, "reinforce the conclusion . . . [that] the import of conformity is to make air pollution control part of the 'continuing program responsibility' of each agency, and to give each agency power to 'control' non-conforming pollution by simply withholding its participation." EDF Joint Brief, *supra* note 296, at 55. EDF also believes that "continuing control" could be easily exercised by including mitigation measures in the SIP. *Id.* at 57-58. "Use of the SIP avoids the need for the approving agency itself to have the authority to impose mitigation measures, or to have enforcement authority separate from the SIP." *Id.*

³³³ EPA Brief, *supra* note 296, at 62-63. As an example, EPA describes the circumstances surrounding sale of land by a federal agency. Under EDF's theory that the federal agency should remain responsible even after the sale, the agency would be responsible for ensuring that the emissions from future use of the land would conform to the SIP. When the sale is complete, EPA argues, "the federal agency has no control over the use of the property and so no means of compelling compliance with any mitigation measures or even ensuring that actual use is consistent with that planned at the time of the sale." *Id.* at 63.

³³⁴ *Id.* at 64. There was no indication that Congress intended to impose as burdensome a requirement on federal agencies performing their statutory functions as would result if the "inclusive" definition³³⁴ of "indirect emissions" was adopted, according to EPA. *Id.* at 67. Additionally, because the language of §176(c)(1) is so "terse as to be ambiguous about how compliance . . . should be met or measured," EPA's interpretation of the statute is entitled to the deference recognized as appropriate under the second prong of the Chevron test. *Id.* at 61. For a brief discussion of the Chevron two-prong test, see *supra* note 322.

EDF argues that the regulatory provision allowing non-conforming federal actions to go forward solely because a state promises to revise its SIP in the future to accommodate the action “violates the categorical mandate of §176(c)(1) that conformity must be measured using ‘an implementation plan after it has been approved or promulgated under §7410 of this title.’”³³⁵ EPA’s approach, they argue, “creates a risk that the promised SIP revision will be delayed past the time when the ‘budget-busting’ federally supported action begins polluting -- or that the revision will not be submitted at all, or will be submitted in an inadequate, non-approvable form.”³³⁶ In other words, EDF argues a promise cannot substitute for conformity.

b. EPA’s Response

On this point, EPA argues against EDF on both procedural and substantive grounds. Procedurally, EPA asserts that EDF is precluded from raising this argument before the court because it failed to do so at any earlier point in the administrative record of the case.³³⁷

Substantively, EPA argues that even if the court reaches this issue, EDF is wrong because a state’s commitment to revise a SIP to accommodate a project is fully enforceable by EPA, which has authority to impose sanctions under §179.³³⁸ This provision was intended to account for the time delay inherent in a SIP revision, says EPA.

³³⁵ EDF Joint Brief, *supra* note 296, at 64. (Emphasis added by EDF.)

³³⁶ *Id.* at 65.

³³⁷ “. . . [T]he law is clear that unless an issue was raised during the administrative process, it cannot be raised for the first time on appeal.” Citing *Natural Defense Resources Council v. U.S. Environmental Protection Agency*, 25 F.3d 1063, 1073-74 (D.C. Cir. 1994).

³³⁸ EPA Brief, *supra* note 296, at 88-89. Clean Air Act §179 enables EPA to sanction violations by prohibiting approval of highway projects and construction grants. 42 U.S.C. §7509.

It would make little sense to require conformity to a SIP undergoing revision when it will be revised before the emissions from the proposed federal action will actually occur.³³⁹

EPA points out that a state's SIP revision commitment must satisfy several specific requirements, including, among others, requirements to identify (1) a specific schedule for adoption and submittal of the SIP revision and (2) specific measures to be incorporated into the SIP to reduce area emissions below the SIP's emissions budgets.³⁴⁰ The Agency believes it wields an effective hammer to ensure the state's commitment to revise the SIP is fully carried out.

As of this writing, Environmental Defense Fund, Inc. v. U.S. Environmental Protection Agency has not been decided by the D.C. Circuit. Clearly, should EDF's arguments prevail, general conformity will become an even more arduous process than it already is, with (in this writer's opinion) minimal additional environmental protection to compensate for the effort.

CHAPTER VII. CONCLUSION

Conformity creates a completely new Clean Air Act compliance scenario for DOD and other federal agencies. It brings together mobile and stationary source emissions, and for good measure tosses in sources not generally regulated by EPA or states, such as aircraft emissions. The litigation described in this thesis may change the playing field considerably, and until the inevitable appeals are resolved it will be unclear to what extent general conformity will drive how DOD and other federal agencies do business.

³³⁹ *Id.* at 90.

³⁴⁰ *Id.* at 89-90.

Combining NEPA and conformity as the court did in Conservation Law Foundation, Inc. v. Department of the Air Force, et.al seems an unnecessary step, as both processes will have to be completed correctly in any event. Indeed, melding the two could cause analytical difficulty, since NEPA analysis is much more a "worst case scenario" approach than is conformity analysis. Creation of the so-called "substantive EIS" may serve to do little more than muddy the NEPA waters and cause confusion over what is and is not "mandatory" under NEPA.

Arguing for application of the General Conformity Rule to attainment and PSD areas is perhaps the most reasonable of the various environmental groups' arguments against the current version of the regulation. Certainly it is reasonable to assume that new development at the edges of nonattainment areas is likely to increase their size, causing more and more encroachment into attainment and PSD areas. The statute's language indicates federal agencies may not undertake actions that cause or contribute to any new violation of any standard *in any area*. EPA believes this language is "ambiguous" as to whether conformity applies only in nonattainment areas,³⁴¹ but the court in Environmental Defense Fund v. Browner held otherwise. Compare this with the court's opinion in Conservation Law Foundation, Inc. v. Department of the Air Force, et.al, in which the judge noted "the language in §176(c) is ambiguous at best. At the time the USAF was formulating its conformity determination, there were no EPA conformity regulations available for guidance. Accordingly, the USAF was guided solely by the statutory language."³⁴² With one federal court decision squarely requiring conformity in attainment

³⁴¹ Final Rule, *supra* note 31, at 63227.

³⁴² CLF, *supra* note 216, at 277.

and PSD areas, and another indicating in dicta that §176(c) is indeed ambiguous, more decisions will be likely be forthcoming as the circuits choose sides on this issue -- that is, unless a legislative rewording of the "ambiguity" makes clear Congress' true intent.

Strict constructionists are likely to agree with environmental groups who charge that EPA should have adopted the "inclusive" definition of indirect emissions -- one that would exclude the language "and which the Federal agency has and will continue to maintain some authority to control." This is the basis for one of the EDF's strongest arguments in Environmental Defense Fund, Inc. v. U.S. EPA,³⁴³ discussed above. Undeniably, there is logic to EDF's position, but should EDF's arguments on this point prevail in that case, we are likely to see Byzantine scenarios which will burden both federal agencies and private entities in a variety of ways.³⁴⁴

Litigation over application of the conformity rule to a project will assuredly follow any expansion of its current coverage. Many public and private projects will be significantly delayed, and many will never go forward even where their air quality impacts

³⁴³ *Supra* notes 296-340 and accompanying text.

³⁴⁴ For example, the Clean Water Act §404 dredge and fill permits issued by the Army Corps of Engineers (COE) are often limited to small portions of otherwise sizable projects, such as a single river crossing for a 500 mile gas pipeline. The COE estimated in its comments to the proposed general conformity regulation that 65,000 of its regulatory actions would have required a conformity review in 1992 under the inclusive definition of indirect emissions. *Id.* EPA noted in its Final Rule, *supra* note 31, at 63219, that the inclusive definition of indirect emissions "could be interpreted to include virtually all Federal activities, since all Federal activities could be argued to give rise to, at least in some remote way, an action that ultimately emits pollution." EPA also noted, "This broadest interpretation of the statute could impose an unreasonable burden on the Federal agencies and private entities that would have been affected by that definition. For example, since the Federal government issues license for any export activities, an inclusive definition approach could go so far as to require the manufacture of the export material and the transportation of the same material to be subject to a conformity review. Such an approach, however, is very burdensome due to the large number of export activities, the fact that the licensing process is not a factor in any SIP, and that the vast majority of these manufacturing and transportation activities may have little to no impact on air quality." *Id.*

are insignificant.³⁴⁵ Without the EPA-imposed "reasonableness" approach, the General Conformity Rule could reach out and adversely affect a vast array of projects which have little or no air pollution effects. While such projects might ultimately result in a positive conformity finding, many might never get that far simply because expending the resources to do a conformity determination would be more expensive and troublesome than the project would be worth to its initiator.

For example, currently EPA believes that participation by military aircraft in air shows and fly-overs is an example of *de minimis* action not requiring a conformity determination under the regulation.³⁴⁶ Air shows draw thousands of community members to military installations each year during open houses. They are a particularly popular public relations tool used, among other things, to engender good will between the base and its civilian neighbors. Fly-overs are similarly popular, and are sometimes included in ceremonial activities such as building and memorial dedications, change of command ceremonies, and military funerals. Neither activity is a source of more than negligible emissions. If the *de minimis* exemption is removed as a result of litigation or legislation, each time a military installation wished to have an air show or perform a fly-over, it would have to undergo a costly and time-consuming conformity determination. The unfortunate outcome of such a requirement would likely be many fewer such events at military installations each year.

³⁴⁵ Public comments received by the EPA in response to its proposed general conformity regulation noted several examples of federal activities that are "not normally considered in SIPs but could not clearly be said to have absolutely no ties to actions that result in emissions of pollutants." Final Rule, *supra* note 31, at 63219. These included COE permits actions, sale of federal land, National Pollutant Discharge Elimination System (NPDES) permit issuance, transmission of electrical power, export license actions, bank failures, and mortgage insurance. *Id.*

³⁴⁶ Final Rule, *supra* note 31, at 63229.

A literal reading of the definition of "federal action" suggests that almost every activity in which the military routinely engages -- aircraft and ground equipment operation, emergency deployment and mobilization, or even procurement actions, for example -- might raise independent and repetitive conformity determination responsibilities in the absence of a regulation limiting the scope of applicability. A federal action, says §176(c), is "*any activity engaged in by a department. . . of the Federal government. . . other than activities related to transportation plans, programs and projects. . .*" (emphasis added).³⁴⁷ The scope of the term "any activity" is not further defined in the statute, leaving one to assume that in the absence of EPA's specific exemptions and presumptions of conformity, almost every action that has a potential effect on air emissions, no matter how minimal, must undergo a complete conformity determination before it can proceed. In an age of dwindling defense dollars, such a result would be a poor allocation of money better spent on more effective environmental remediation efforts.

Unless one assumes that the actual goal of §176(c) is simply to bring all activities that emit any criteria pollutants to a grinding halt, EPA's position that it is unreasonable to conclude that a federal agency "supports" an activity by third persons over whom the agency has no practicable control (or the emissions they generate) is the only workable way in which to implement general conformity. Where federal control over resulting emissions is minor or nonexistent, state and local agencies must step forward to control the non-federal sources that are the cause of the problem.³⁴⁸

³⁴⁷ 40 C.F.R. §93.152.

³⁴⁸ EPA notes in the Final Rule that "a solution may be impossible unless it is directed at all the contributing sources. This role is given to the State and local agencies by Congress and should not be interpreted as the Federal agencies' role under section 176(c)." Final Rule, *supra* note 31, at 63220.

It is unclear whether the current Congressional push to weaken federal environmental laws will ultimately affect general conformity and its application to DOD and other federal agencies. It is not unreasonable to expect that if the environmental groups win on the litigation battlefield, many private projects which require federal permits or other federal approvals will grind to a halt if they cannot achieve a positive conformity determination. When this happens often enough, members of Congress will begin hearing the angry objections of private business -- perhaps the only influence they will feel obliged to respond to on this issue if they wish to remain in office.

No matter what form the general conformity requirement eventually takes, DOD can minimize delays and cost by good strategic planning when designing and implementing a project. Effective incorporation of emission-reduction technology can help an installation qualify for a *de minimis* exemption, should that exemption survive the current EDF legal challenge. Innovative thinking by those responsible for making the conformity analyses will be invaluable, although perhaps potentially hard to find until DOD becomes more familiar with conformity and all it requires.

ACRONYM LIST

AFCEE - Air Force Center for Environmental Excellence
 AF/CEV - Civil Engineer, Headquarters, U.S. Air Force
 BEE - Bioenvironmental Engineering Office
 CAA - Clean Air Act
 CERCLA - Comprehensive Environmental Response, Compensation and Liability Act
 CEQ - Council on Environmental Quality
 CFR - Code of Federal Regulations
 CLF - Conservation Law Foundation
 COE - Army Corps of Engineers
 DOD - Department of Defense
 DOJ - Department of Justice
 DOT - Department of Transportation
 EA - Environmental Assessment
 EDF - Environmental Defense Fund
 EF - Environmental Flight
 EIS - Environmental Impact Statement
 EPA - Environmental Protection Agency
 ERC - Emission Reduction Credit
 FHWA - Federal Highway Administration
 FONSI - Finding of No Significant Impact
 FTA - Federal Transit Administration
 GOV - Government Owned Vehicle
 MAJCOM - Major Command
 MOU - Memorandum of Understanding
 MPO - Metropolitan Planning Organization
 NAAQS - National Ambient Air Quality Standards
 NEPA - National Environmental Policy Act
 NPDES - National Pollutant Discharge and Elimination System
 NRDC - Natural Resources Defense Council
 NSR - New Source Review
 PDA - Pease Development Authority
 PSD - Prevention of Significant Deterioration
 POV - Privately Owned Vehicle
 ROD - Record of Decision
 SAF/MIQ - The Assistant Secretary of the Air Force for Manpower Reserve Affairs
 (Installation and Environment)
 SJA - Staff Judge Advocate
 SIP - State Implementation Plan
 SOW - Statement of Work
 TCM - Transportation Control Measure
 USAF - United States Air Force
 UST - Underground Storage Tank
 VOC - Volatile Organic Compound

APPENDIX A

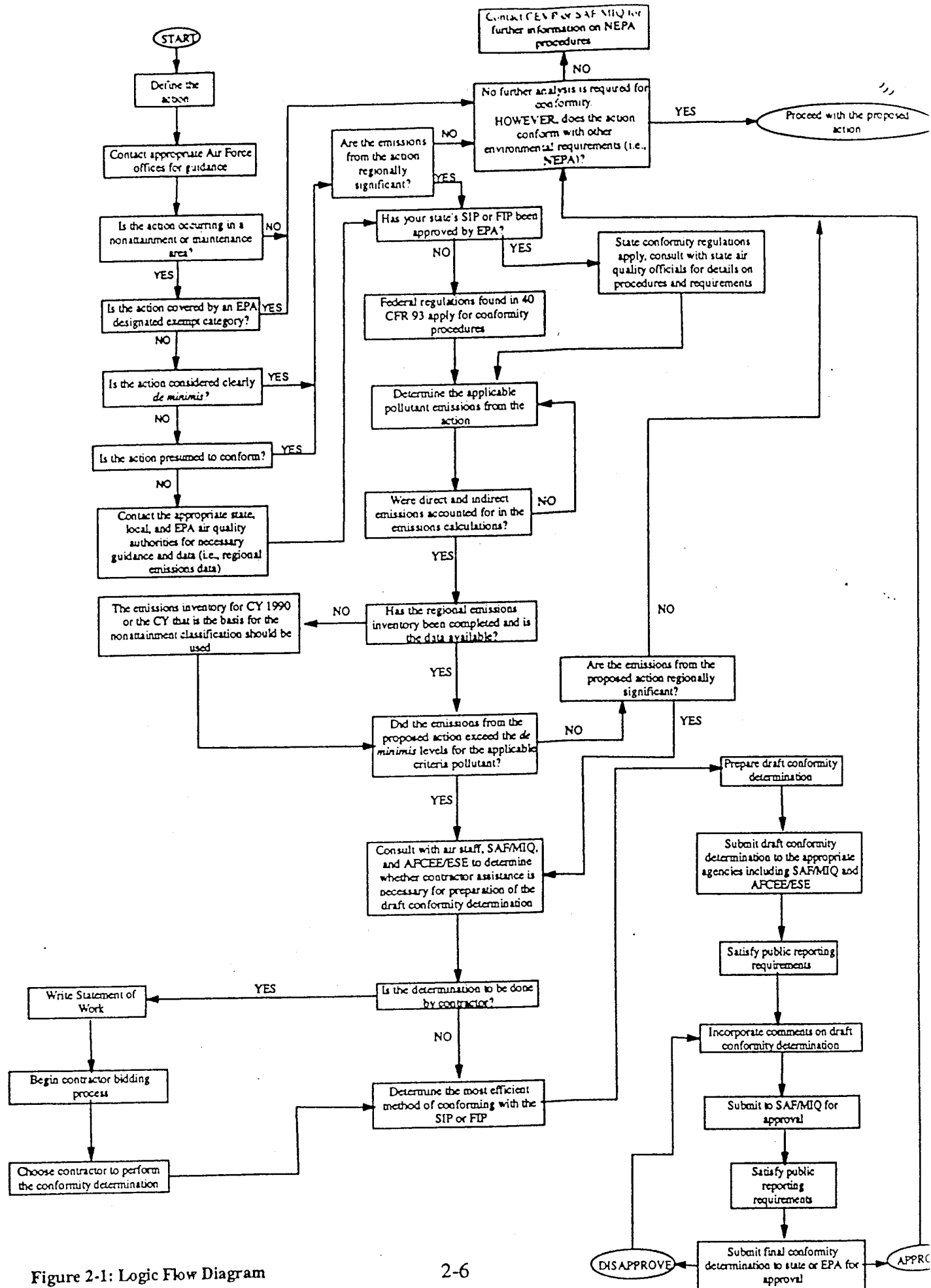


Figure 2-1: Logic Flow Diagram

APPENDIX B

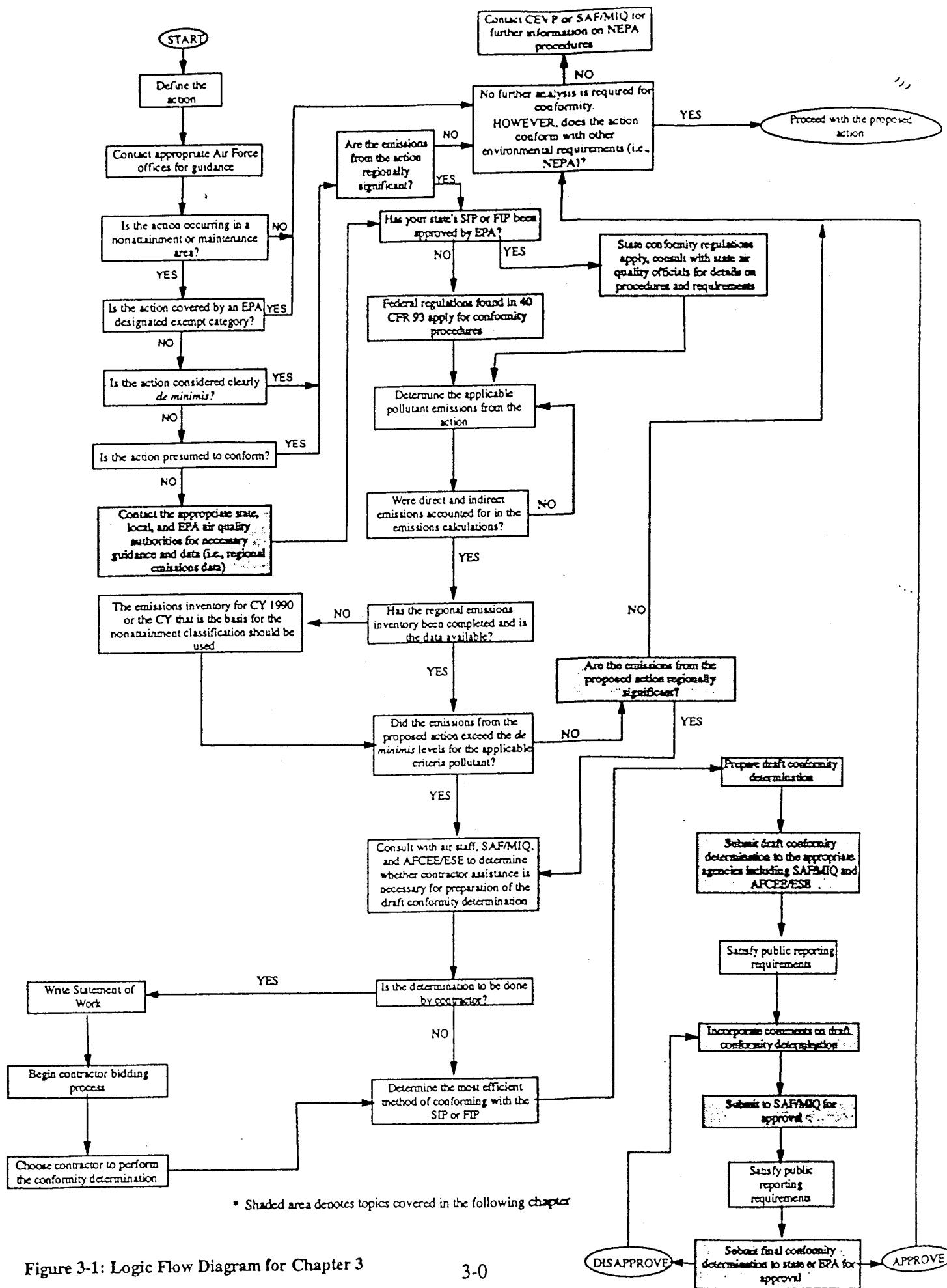
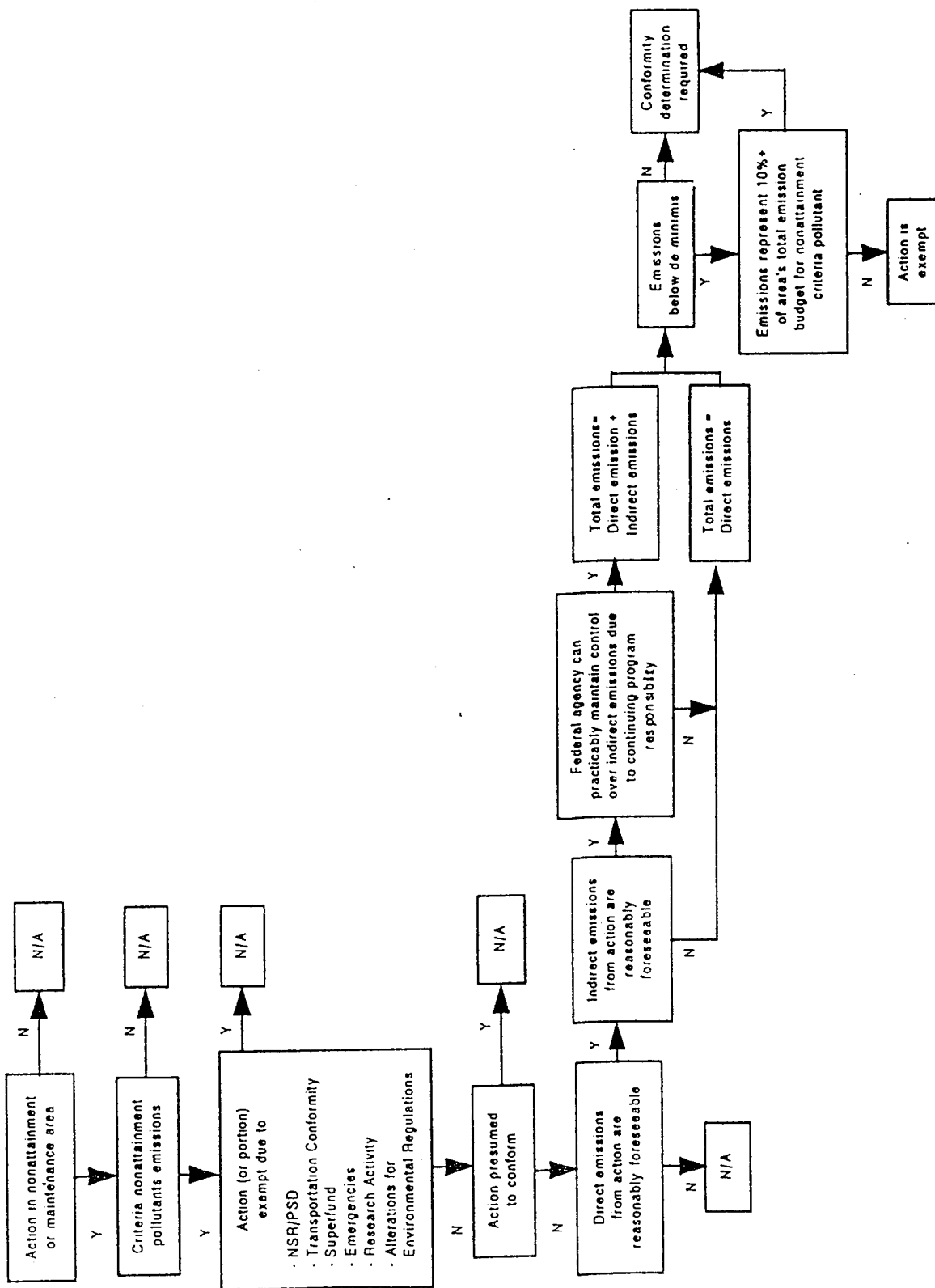


Figure 3-1: Logic Flow Diagram for Chapter 3

APPENDIX C

FLOW CHART FOR DETERMINING APPLICABILITY



APPENDIX D

APPENDIX C

SUMMARY OF CRITERIA FOR DETERMINING CONFORMITY

| Criteria | Areawide Only | | Local and Possibly Areawide | | Local Only |
|---|----------------|-----------------|-----------------------------|----|--------------------|
| | O ₃ | NO ₂ | PM-10 | CO | Pb/SO ₂ |
| (1) Specified in attainment or maintenance demonstration | X | X | X | X | X |
| (2) Offsets within same nonattainment/maintenance area | X | X | | | |
| (3)(i) Areawide and local modeling | | | X | X | X |
| (3)(ii) Local modeling and meet Section 51.858(a)(5) | | | X | X | |
| (4)(i) Local modeling only if local problem | | | X | X | |
| (4)(ii) Areawide modeling only or meet Section 51.858(a)(5) | | | X | X | |
| (5)(i) Emissions budget | X | X | #* | #* | # |
| (5)(ii) Transportation plan | X | X | #* | #* | # |
| (5)(iii) Offsets | X | X | #* | #* | # |
| (5)(iv) Baseline/No increase | X | X | #* | #* | # |
| (5)(v) Water project | X | X | #* | #* | # |

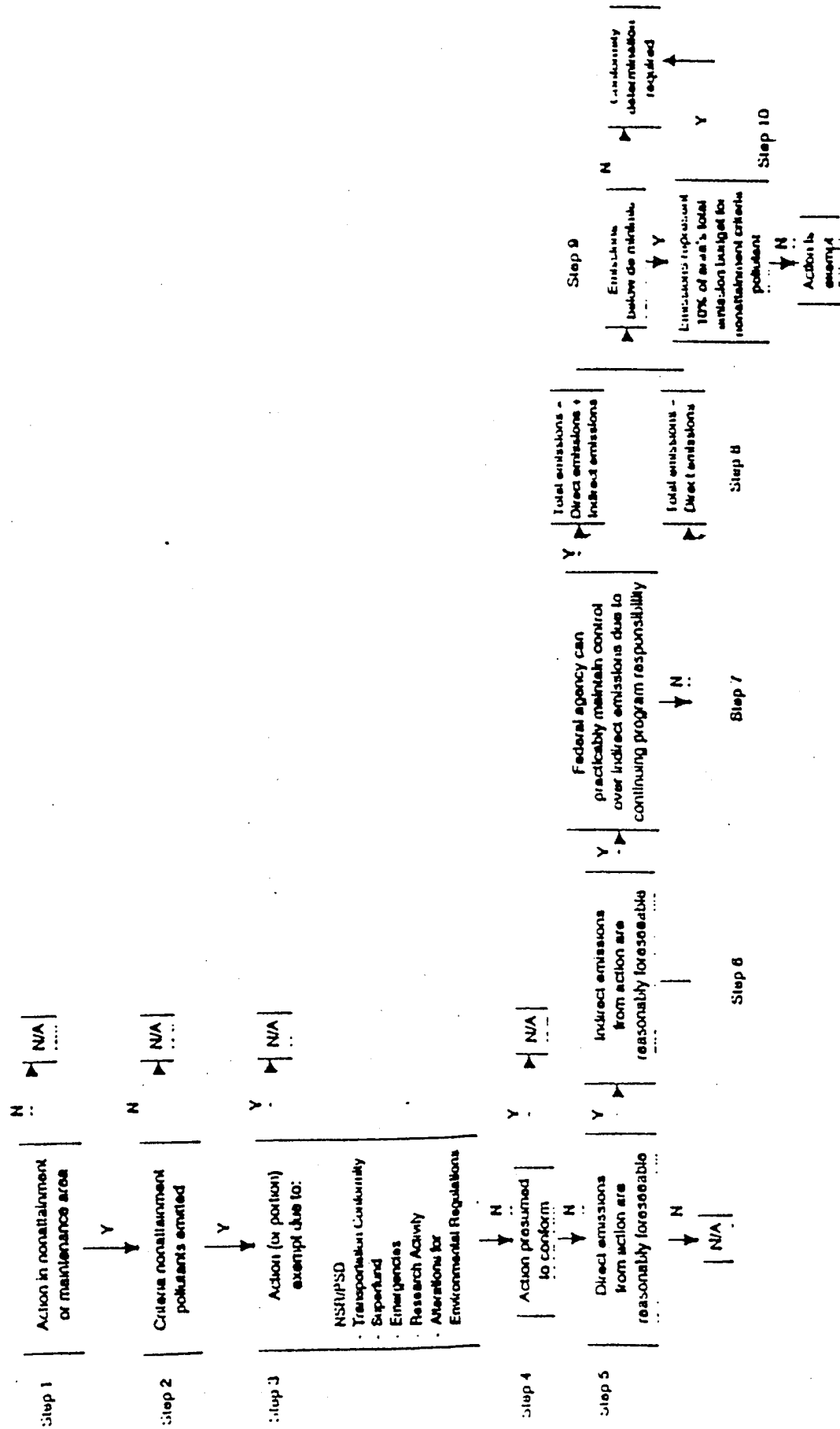
X = Option to Show Conformity

= Option in conjunction with local modeling (51.858(a)(3)(ii)).

* = Option in conjunction with areawide modeling (51.858(a)(4)(ii)).

APPENDIX E

FLOW CHART FOR DETERMINING APPLICABILITY



APPENDIX F

| SUMMARY OF CONFORMITY DETERMINATION CRITERIA | | | | | |
|---|----------------|-----------------|--------------------------|----|--------------------|
| | Areawide Only | | Local and/or Areawide | | Local only |
| Section 51.158(a) | O ₃ | NO ₂ | PM-10 | CO | Pb/SO ₂ |
| (1) Specified in attainment or maintenance demonstration | X | X | X | X | X |
| (2) Offsets within same area | X | X | | | |
| (3)(i) Areawide and local modeling | | | X | X | X |
| (3)(ii) Local modeling and (5) | | | X | X | X |
| (4)(i) Local modeling only if local problem | | | X | X | |
| (4)(ii) Area- wide modeling only or (5) | | | X | X | |
| (5)(i) Emission budget or State commitment | X | X | * | * | |
| (5)(ii) Trans- portation plan | X | X | * | * | |
| (5)(iii) Offsets | X | X | * | * | |
| (5)(iv) Baseline | X | X | * | * | |
| (5)(v) Water Project | X | X | * | * | |

"X" Means method is available for making a Conformity
Determination for that pollutant
"*" Option if areawide problem only

APPENDIX G

RATES FOR NONATTAINMENT AREAS:¹

Tons/Year

| | |
|---|-----|
| <u>Ozone (VOCs or NOx):</u> | |
| Serious N/A areas | 50 |
| Severe N/A areas | 25 |
| Extreme N/A areas | 10 |
| Other ozone N/A areas outside an ozone transport region | 100 |
| Marginal and moderate N/A areas inside an ozone transport region: | |
| VOC | 50 |
| NOx | 100 |
| <u>Carbon Monoxide:</u> | |
| All N/A areas | 100 |
| <u>SO₂ or NO₂:</u> | |
| All N/A areas | 100 |
| <u>PM₁₀:</u> | |
| Moderate N/A areas | 100 |
| Serious N/A areas | 70 |
| <u>Lead:</u> | |
| All N/A areas | 25 |

¹ 40 C.F.R. §93.153(c)

APPENDIX H

RATES FOR MAINTENANCE AREAS:¹

Tons/Year

| | |
|---|-----|
| <u>Ozone (NO_x), SO₂ or NO₂:</u> All maintenance areas | 100 |
| <u>Ozone (VOCs):</u> Maintenance areas inside an ozone transport region | 50 |
| Maintenance areas outside an ozone transport region | 100 |
| <u>Carbon Monoxide:</u> All Maintenance areas | 100 |
| <u>PM₁₀:</u> All maintenance areas | 100 |
| <u>Lead:</u> All maintenance areas | 25 |

¹ 40 C.F.R. §93.153(b)(2).